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No. 543

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

GORDON L. HARMSEN,
Petitioner and Appellee, below,

vs.

DRANE FIZZELL, THEO FIZZELL,
WILLIAM JOHNSTON and DONNA JOHNSTON,
Respondents and Appellants below.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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INDEX TO MATTER CONTAINED IN APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

	Page
Calendar of Proceedings in Supreme Court of Michigan	15
First Opinions Rendered by Supreme Court of Michigan in Instant Case, Referred to in Petition as Exhibit "A"	20
Opinions Rendered by Supreme Court of Michigan in Companion Case, Referred to in Petition as Exhibit "C"	52
Order Affirming Circuit Court	42
Order Denying Motion to Dismiss	18
Order Denying Rehearing	51
Order Extending Time for Settlement of Record	17
Order Granting Leave to Appeal	16
Order Granting Rehearing	45
Order Resubmitting Cause Without Argument	46
Order Reversing Circuit Court	50
Order Submitting Motion for Rehearing	44
Order Submitting Cause on Briefs	19
Second Opinions Rendered by Supreme Court of Michigan in Instant Case, Referred to in Petition as Exhibit "B"	47

CALENDAR OF PROCEEDINGS IN SUPREME COURT OF MICHIGAN

(No. 47013)

(Appeal from Berrien)

DATE	PROCEEDINGS
1956	
July 28,	Application for leave to appeal filed.
Oct. 10,	Application granted — with stay.
Dec. 3,	Stipulation extending time to settle bill of exceptions filed.
4,	Order entered — time extended to December 14, 1956.
Nov. 1,	Motion to dismiss filed.
Dec. 4,	Motion denied — time extended to December 21, 1956.
21,	Record on appeal filed.
1957	
Mar. 4,	Stipulation to proceed under new rules filed.
May 3,	Note of argument filed.
June 11,	Submitted on briefs.
Dec. 24,	Affirmed by equal division. No costs.
1958	
Jan. 20,	Record returned to court below.
29,	Motion for rehearing filed.
Mar. 4,	Rehearing granted.
Apr. 18,	Resubmitted.
July 15,	Reversed; costs to appellants.
Sept. 2,	Motion for rehearing submitted.
9,	Rehearing denied, costs to appellants.
Nov. 14,	Record certified to Supreme Court of U. S.

ORDER GRANTING LEAVE TO APPEAL

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the tenth day of October in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
EDWARD M. SHARPE,
TALBOT SMITH,
GEORGE EDWARDS,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

In this cause an application is filed by defendants for leave to appeal from an order of the Circuit Court for the County of Berrien and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby GRANTED.

It is further ordered that all proceedings in this cause be stayed pending the determination of this appeal, or until the further order of this Court.

STATE OF MICHIGAN—ss.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme
(SEAL) Court at Lansing, this 11th day of October in the year of our Lord one thousand nine hundred and fifty-six.

(s) Hugh H Carpenter,
Clerk.

ORDER EXTENDING TIME FOR SETTLEMENT OF RECORD

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of December in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

EDWARD M. SHARPE,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
Associate Justices.

On reading and filing a stipulation signed by the attorneys for the respective parties hereto, extending the time within which defendants may settle the record on appeal from the Circuit Court for the County of Berrien, and in accordance with such stipulation, It is ordered that the time within which defendants may settle the record on appeal as aforesaid be and the same is hereby extended to and including December 14, 1956.

STATE OF MICHIGAN—ss.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme (SEAL) Court at Lansing, this 4th day of December in the year of our Lord one thousand nine hundred and fifty-six.

(s) Hugh H. Carpenter,
Clerk.

ORDER DENYING MOTION TO DISMISS

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of December in the year of our Lord one thousand nine hundred and fifty-six.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

EDWARD M. SHARPE,
TALBOT SMITH,
GEORGE EDWARDS,
EMERSON R. BOYLES,
HARRY F. KELLY,
LELAND W. CARR,
Associate Justices.

In this cause a motion is filed by plaintiff to dismiss the appeal heretofore allowed herein, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court, It is ordered that the motion be and the same is hereby denied, and it is ordered that the time within which defendants may settle the bill of exceptions on appeal be and the same is hereby extended to December 21, 1956.

STATE OF MICHIGAN—ss.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of December in the year of our Lord one thousand nine hundred and fifty-six.

(SEAL)

(s) Hugh H. Carpenter,
Clerk.

ORDER SUBMITTING CAUSE ON BRIEFS

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eleventh day of June in the year of our Lord one thousand nine hundred and fifty-seven.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

EDWARD M. SHARPE,
TALBOT SMITH,
GEORGE EDWARDS,
JOHN D. VOELKER,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

This cause coming on to be heard, is duly submitted on briefs.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this ..... day of ..... in the year of our Lord one thousand nine hundred and fifty-seven.

(s) .....
Clerk.

EXHIBIT A

June Term 1957

STATE OF MICHIGAN
SUPREME COURT

Gordon L. HARMSEN, Plaintiff and Appellee,

vs.

Deane FIZZELL, Theo Fizzell, William Johnston and Donna Johnston, Defendants and Appellants.

No. 48.

Supreme Court of Michigan
December 24, 1957.

Before the Entire Bench.

SHARPE, Justice.

This is a habeas corpus proceedings brought by Gordon L. Harmsen, the father of David L. Harmsen and Ruth Harmsen, following denial by the probate court of Berrien county of the father's petition for the restoration of his children by the probate court. The chain of events leading up to the application for writ of habeas corpus are as follows:

Gordon L. Harmsen and Marie Harmsen were married, and as a result of their marriage, three children were born. On May 29, 1953, Mary Ash, a neighbor of the Harmsens, filed a petition in the Berrien county probate court, juvenile division, praying that the court take jurisdiction of the three children. Upon the filing of the petition the probate court entered an order directing the county agent to make a full investigation and report her findings to the probate court. On June 19, 1953, plaintiff was declared mentally incompetent by the Berrien county probate court and confined to the Kalamazoo State Hospital. His wife, Marie Harmsen, was appointed guardian of his person and estate by the Berrien probate court.

On May 20, 1954, Marie Harmsen filed a petition in the probate court of Berrien county praying for the juvenile

division of probate court to take jurisdiction of the three Harmsen children. On the following day an order was entered in the probate court which reads as follows:

"In the matter of
Roger Allen Harmsen,
David Leroy Harmsen,
Ruth Etta Harmsen,
A Juvenile.

"To Frances M. Milton, County Agent for said County:

"Marie Harmsen having reported to this Court that said Roger, David and Ruth Harmsen is a juvenile within the meaning of Act 54, P. A. 1944 Extra Session. You are hereby notified and required to inquire into and make a full examination of the parentage and surroundings of said child, and the facts and circumstances alleged by Marie Harmsen, and report the same to said Court.

"Dated this 21st day of May, A.D. 1954.

"(s) Malcolm Hatfield,
"Judge of Probate.

"Filed May 21st, 1954."

It also appears that on May 20, 1954, Marie Harmsen signed certain forms consenting to the adoption of all three minor children. On May 28, 1954, two summonses were issued out of the probate court reciting Marie Harmsen's petition, and hearing was set for June 2, 1954. Proof of service of this summons appears for Gordon L. Harmsen, by service upon the Superintendent of Kalamazoo State Hospital, but with no personal service upon Marie Harmsen, the mother of the children.

On June 2, 1954, an assistant county welfare agent made a report wherein she recommended that all three children be committed to the Michigan Children's Institute for the purpose of adoption, and on the same day the probate judge entered an order "that this case be adjourned indefinitely but that the children remain under the jurisdic-

tion of this Court until further action is taken." David Harmsen was placed in the custody of defendants, Deane Fizzell and Theo Fizzell, and Ruth Harmsen was placed in the custody of William Johnston and Donna Johnston. Roger Harmsen was placed with different people from time to time.

On June 30, 1955, plaintiff was declared competent by the Berrien probate court. On May 1, 1956, he petitioned the probate court for the custody of David and Ruth Harmsen. After an investigation was made the probate court dismissed plaintiff's petition for restoration of his two children. Subsequently defendants Fizzell and Johnston filed petitions in the probate court requesting orders be made committing David Harmsen and Ruth Harmsen to the Michigan Children's Institute for the purpose of adoption. A hearing on this petition was set for July 17, 1956, but before any hearing was held, plaintiff, on June 15, 1956, filed his petition in the Berrien circuit court for writ of habeas corpus and ancillary writ of certiorari. On June 15, 1956, plaintiff appealed from the order of the probate court dismissing his petition for restoration of his two children.

On July 6, 1956, an order was filed by the circuit judge restoring custody of David and Ruth Harmsen to plaintiff. On the hearing of plaintiff's petition for writs of habeas corpus and certiorari, the defendants, on June 22, 1956, moved for the dismissal of the writs of habeas corpus and certiorari for the reason that the children were under the jurisdiction of the juvenile division of the Berrein probate court, which jurisdiction was exclusive and original. This motion was denied and in an opinion the trial court stated:

> "There is no question that the jurisdiction of the probate court under the juvenile act is original and exclusive in some respects. There is no question that habeas corpus cannot be substituted for a writ of error or to be made to serve the purpose of a writ of error; but in this case the probate court has never made an appealable order. There is an illegal detention, the very condition that gave rise to the original jurisdiction of the probate court having been removed when the father, Gordon Harmsen, was restored to

health on June 30, 1955. The changed condition of the status of the children left nothing to justify any action whatsoever by the probate court, either on the father's petition for restoration of the children, which he filed, or otherwise; and nothing remained but to return the children to him. There being no order of any court to the contrary, the father, Gordon Harmsen, could have proceeded, had he so desired, to obtain his children without the process of any court. He saw fit, however, to request the cooperation of the probate court in the premises, which was denied him; nothing remained then for him to do but obtain the writ in the present proceedings, where the only question that could possibly be presented is that of his fitness as a father to have his children.

"All of the testimony in the habeas corpus proceeding demonstrates such fitness ever since June 30, 1955. Nothing whatsoever appears to the contrary. One of the children is in the home of and in the custody of Ruth Pearson, whom the father intends to marry as soon as the interlocutory period in divorce has been concluded, decree having been granted the father in this court, in chancery, on May 1, 1956. The Friend of the Court in the divorce proceedings definitely approves such home and so testified at this hearing. His present home is adequate."

The principal issue in this case is whether the juvenile division of the probate court or the circuit court has jurisdiction over the custody of the two minor children. It is urged by defendants that the juvenile division of the probate court is exclusive and the trial court had no authority to issue writs of habeas corpus.

Probate courts are courts of limited jurisdiction and must comply with statutory requirements in order to obtain legal jurisdiction of minors. In MacKenzie vs. Union Guardian Trust Co., 262 Mich. 563, 582, 247 N.W. 914, 921, we quoted with approval from Grady vs. Hughes, 64 Mich. 540, 545, 31 N.W. 438, as follows:

"'The probate court derives none of its jurisdiction or power from the common law, but must find the

warrant for all of its doings in the statute. Its jurisdiction, powers, and duties are prescribed by law.'"

Under C. L. S. 1954, § 712A.2 (Stat. Ann. 1955 Cum. Supp. § 27.3178 (598,2) the juvenile division of the probate court shall have:

> "(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county
> "(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or
> "(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support."

We shall first discuss the Mary Ash petition to determine whether the probate court had jurisdiction to make an order relative to their custody. The Mary Ash petition was filed May 29, 1953, praying that the juvenile court take jurisdiction of the three children. Upon the filing of this petition the probate court entered an order directing the county agent to make an examination and report her findings to the court. The record fails to show that the probate court took any further action on this petition, hence the petition of Mary Ash needs no further consideration.

We now come to the petition of Marie Harmsen filed May 20, 1954. The petition states that she is the mother of the children, eight, seven and four years of age respectively, and that they are residing with her in Berrien Springs and are under her custody and control. The petition further states:

Exhibit A

"* * * Said children are beyond my control. I am not physically well enough to cope with them. I know that they would be better off were they placed in good adoptive homes. Their father is in Kalamazoo State Hospital, and I have been told that he is incurable. The children need security that I cannot give them."

The following day, May 21, 1954, the probate court requested the county agent to investigate the matter. On May 28, 1954, two summonses were issued out of the probate court reciting Marie Harmsen's petition and hearing was set for June 2, 1954. Proof of service of this summons appears for Gordon L. Harmsen by service upon the Superintendent of Kalamazoo State Hospital, however no personal service was had upon Marie Harmsen.

It also appears that a report was made to the judge of probate by an assistant county welfare agent recommending that the three children be committed to the Michigan Children's Institute for the purpose of adoption. On the same day, June 2, 1954, the probate judge entered an order "that this case be adjourned indefinitely but that the children remain under the jurisdiction of the Court until further action is taken." It does not appear from the records before us that the probate judge entered any order on the petition of Marie Harmsen, except to postpone the cause indefinitely.

We are of the opinion that the petition filed by Marie Harmsen does not comply with the statutory requirement. The petition does not allege that the children were neglected; that the parents failed or refused to provide them necessary support; that the children were abandoned, or that the home was unfit or improper by reason of cruelty or drunkenness, criminality or depravity as required by statute. Service upon Marie Harmsen was a necessary step in order that the court could have jurisdiction of the cause. The court in the instant case did not acquire jurisdiction of the cause and his order postponing the cause indefinitely was a nullity.

The record does not show by what means the two oldest children came into the custody of defendants. There is no lawful order in the record before us granting custody

of the two minor children to defendants. Under such circumstances habeas corpus is the proper remedy to obtain custody of a minor from an unlawful detention. See In re Adams, 214 Mich. 199, 188 N.W. 241.

When the cause came on for trial in the circuit court the trial court found as a fact that the father was a fit person to have custody of the two minor children and that there was no evidence to the contrary. We hold that the proceedings in the probate court did not give that court jurisdiction to issue any order granting possession of the children to defendants and that habeas corpus proceedings in the circuit court is a proper forum to test the validity of the proceedings in the probate court.

The order of the circuit court is affirmed, with costs to plaintiff.

DETHMERS, KELLY and CARR, JJ., concurred with SHARPE, J.

EDWARDS, Justice.

This case involves the lives of 2 children. Much misfortune has already befallen them. There is grave danger that legal errors of the court charged by our Michigan Constitution with the duty of helping them may occasion them still more trouble.

Before we deal with the technical legal problems with which we must be concerned on this appeal from a grant of custody to a father on a writ of habeas corpus, there are several undisputed facts which cry out to be added to our consideration of the ultimate result.

1—On June 19, 1953, the father of David and Ruth Harmsen, and petitioner herein, was declared mentally incompetent by the Berrien county probate court and committed to the Kalamazoo State hospital wherein he was diagnosed as seriously mentally ill by the medical superintendent, and wherein he remained until June 30, 1955.

2—On May 20, 1954, Marie Harmsen, the mother of the 2 children, filed a petition alleging that she was unable to control or care for these 2 children (and 1 other not the subject of our immediate concern) and asking the probate court to take jurisdiction of them; and on that

same day she likewise signed a consent to the adoption of all 3 of her children.

3—It likewise appears plain and undisputed in this record that the 2 children, David and Ruth, were left with the probate court of Berrien county by their mother and were taken into its jurisdiction by a formal order, and remained under its care without any attempt on the part of either parent to pick up the burdens of parenthood until May 1, 1956, 2 years later, when the father and present petitioner filed a petition in the probate court for the return to him of David and Ruth.

Thus it appears beyond dispute from this record that the children were for 2 full years without any vestige of parental support or control. It also appears that the assumption of jurisdiction by the probate court of their care was actively sought by the mother and has never been disputed by her, and that the court's care of these children was known to and agreed to by the father up to the point of the petition for return.

Nonetheless the circuit court below, (and my Brother in his affirmance of the circuit judge) holds the probate court never had jurisdiction because (1) the petition upon which the probate court based its jurisdiction over these 2 children was defective in that it did not comply with statutory requirements; (2) that no service of process was had upon the mother of the children prior to hearing; and (3) that the order taking jurisdiction was improperly drawn, and hence invalid.

We turn now to these 3 technical issues upon which the question of jurisdiction turns.

In my view, the petition upon which the court founded its jurisdiction recited ample facts under the juvenile code for a valid order assuming jurisdiction. The statute does not prescribe any particular words. The petition said a great deal in a few lines:

> "In the Matter of the Petition Concerning
>
> "Roger Allen Harmsen, born 11-12-46—Grand Rapids
> David Leroy Harmsen, born 11-4-45—Grand Rapids
> Ruth Etta Harmsen, born 8-15-49—Niles
>
> Minor.

Exhibit A

"I, Marie Harmsen, respectfully represent that I reside R.F.D. of Berrien Springs in said county, and make this petition as mother.

"I further represent that said children are residents of Berrien Springs in Berrien county, and are now residing with and under the custody and control of myself and they were born on 11-12-46; 11-4-45 and 8-15-49 respectively.

"I further represent upon information and belief that said children are beyond my control. I am not physically well enough to cope with them. I know that they would be better off were they placed in good adoptive homes. Their father is in Kalamazoo State hospital and I have been told that he is incurable. The children need security that I cannot give them.

"I further represent that the names, relationship, ages and residences of nearest of kin and guardian of said child—, as I am informed and believe, are as follows:

Name	Relationship	Age	Residence
Gordon Harmsen	father		Kalamazoo State Hospital
Marie Harmsen	mother		R.F.D. Berrien Springs
c/o Mrs. Burton Guthrie			Berrien Center, Tel. Eau Claire 2367

"I therefore, pray that the Juvenile Court take jurisdiction of said children.

"(s) Marie Harmsen."

Thus the petition placed before the probate court the facts that the father of these children was in a mental institution, that the mother had been advised he was incurable, that she herself was physically too ill to control, cope with them, or give them the security which they needed. A search of the probate court file indicates that there is no record of any subsequent effort to see, care

for, or seek the return of the children by the mother at any subsequent stage of this proceeding.

The Constitution of the State of Michigan (1908), art. 7, § 13, grants to the probate courts of this State "original jurisdiction in all cases of juvenile delinquents and dependents." The juvenile code of this State vests in the juvenile division of the probate court

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship." C. L. S. 1956, § 712.A2 (Stat. Ann. 1955 Cum. Supp. § 27.3178 (598.2(b) (1)).

The requirements of the petition are spelled out by statute as follows:

"The petition shall be verified and may be upon information and belief. It shall set forth plainly the facts which bring said child within the provisions of this chapter, and shall state (1) the name, birth date, and residence of the child; the names and residence; (2) of the parents; (3) of his legal guardian, if there is one; (4) of the person or persons having custody or control of the child; and (5) of the nearest known relative if no parent or guardian can be found. If any of the facts herein required are not known to the petitioner, the petition shall so state." C. L. 1948, § 712A.11 (Stat. Ann. 1955, Cum. Supp. § 27.3178 (598.11).

A reading of these sections convinces this Court that facts are alleged in the petition quoted which, if sustained at hearing, would warrant a finding that these children had been abandoned by their parents or guardian, or were otherwise without proper custody or guardianship.

As to the issue pertaining to service of summons and notice of hearing on the above petition, the file discloses personal service upon the father, the petitioner here, at Kalamazoo State Hospital. It likewise discloses that on May 20 the probate judge wrote the superintendent of the

Kalamazoo State hospital stating to him the essence of the mother's petition, and asking him to ascertain the father's reaction thereto. The probate court file further discloses a letter from Dr. R. A, Morter, medical superintendent of Kalamazoo State hospital, to the probate judge re Gordon Harmsen, as follows:

"May 21, 1954

"Hon. Malcolm Hatfield
"Judge of Probate
"St. Joseph, Michigan

Re: Gordon Harmsen

"Dear Judge Hatfield:

"I have your letter of May 20th and wish to inform you that Gordon Harmsen was admitted to this hospital on June 19, 1953. He is suffering from a very serious type of mental trouble. He has shown no improvement since his admission to this hospital. He constantly talks about getting out of the hospital and earning money to support his children. We are of the opinion that he is not well enough to be released from the hospital and it probably will be a long long time before he will show improvement. If he ever recovers sufficiently to be released from the hospital, he is quite likely to have a recurrence of his mental trouble.

"Yours very truly,

"(s) R. A. Morter
"R. A. Morter, M.D."

Subsequent to receipt of this letter, the probate judge entered an order for service by registered mail upon Gordon Harmsen through Dr. Morter at Kalamazoo State Hospital, and the record discloses a proof of service upon Mr. Harmsen personally on May 27, 1954, by one Jack Emmons. The file next discloses a letter from Mr. Harmsen to the probate judge which clearly revealed his understanding of the nature of the proceedings and his agreement at least to a limited degree:

Exhibit A

"Thu., May 27, 1954
"Gordon L. Harmsen
"Kalamazoo
"Box A, Mich.

"Judge of Probate
"Malcolm Hatfield
"St. Joseph, Mich.

"Dear Sir:

"I received the court order today regarding my children Roger Allen Harmsen, David Leroy Harmsen and Ruth Etta Harmsen. I feel that the children need the security of a home and parents to develop normally, they need love and affection.

"It would be my desire to be there if for no other reason than to again see my wife and my children as I have not seen them these many months. Neither have I heard how they were for my wife would not even mention them in her letters, which were of a hard nature.

"I would like to public-ly apologize before the court for what I said of her, in her presence. Then I was not in control of my emotions and what I said was by impulse. I never seen or knew it could happen. Now I am in control of my emotions and am not impulsive. Neither do I regret the results. One must learn. I realize I overworked.

"Could you transfer the guardianship to Bro. Ford Lewis or Mrs. Ruth Pearson. My wife is not intent on any good coming to me. I believe a guardian should be one's friend.

"Respectfully,

"(s) Gordon Harmsen"

The next items in the probate court file are 2 entries indicating attempts of service upon Mrs. Harmsen, dated May 27 and May 28, the last of which apparently resulted in service upon one Mrs. Burton Guthrie, at Berrien Center, which the summons listed as the last known address of the mother.

In addition to the above, an attorney, Donald J. Dick, appeared for the mother, Marie Harmsen, in the subsequent hearing upon this petition and filed a waiver of notice and consent on behalf of her.

Under proper circumstances, the juvenile code authorizes, in addition to personal service, service by registered mail or by publication. C. L. 1948, § 712A.13 (Stat. Ann. 1955 Cum. Supp. § 27.3178 (598.13). The code also provides for waiver of service of process or notice of hearing. C. L. 1948, § 712A.12 (Stat. Ann. 1955 Cum. Supp. § 27.3178 (598.12).

In this case, both parents plainly were informed of the purpose and nature of this proceeding. We note that the waiver referred to was signed by the mother's attorney rather than by her. While such a waiver, if unauthorized might be attacked by the mother, we hold that the father, who was personally served, cannot now attack it collaterally. Under this record, we hold the waiver effective for purposes of jurisdiction.

The third claim of fatal defect in these proceedings pertains to the order entered by the probate judge on the petition which we have previously described, at the hearing held on June 2, 1954. Prior to the hearing, the probate judge had caused an investigation of the petition pertaining to these children to be made, as authorized by statute. C. L. 1948, §§ 712A.11, 712A.12 (Stat. Ann. 1955 Cum. Supp. §§ 27.3178 (598.11), 27.3178 (598.12). The probate file discloses a full report based on that investigation, made by Frances M. Milton, the assistant county agent:

"Report of Asst. County Welfare Agent to:
"Hon. Malcolm Hatfield,
Probate Judge.

"In the Matter of:

David Leroy Harmsen, b. 11-4-45
Roger Allen Harmsen, b. 11-12-46
Ruth Etta Harmsen, b. 8-15-49

Petitions Dated May 29, 1953
and May 20, 1954

Exhibit A

Parents:

Gordon Harmsen, Kalamazoo State Hospital
Marie Harmsen, c/o Mrs. Burton Guthrie, Berrien Center

"These children were first called to the attention of this Court on May 29, 1953 when a neighbor, Mrs. Mary Ash of Berrien Springs, signed the following petition:

" 'The above named children are being abused by their father, Gordon Harmsen. The father whips the children until they are black and blue. He yells and screams at the children. The mother told me they didn't have enough to eat. Father works at the Fan Company in Niles. The mother cans fruit and that is all I have seen on their table. The teacher at school said David took lunches from other children at school, although they have practically broken him of that, but the children are thin and under nourished. The mother is very too. Mrs. Bennett, of the BSA, asked me to sign a complaint and ask worker to contact her. Also the police at Berrien Springs said something should be done with the father of these children.'

"This family was referred to the Family Counselling Service and later to the Bureau of Social Aid. Prior to the father's final commitment at Kalamazoo, he was apprehended by the Sheriff Department for beating the children with a strap until they were black and blue.

"On May 20, 1954 the mother filed a petition alleging the following:

" 'Said children are beyond my control. I am not physically well enough to cope with them. I know that they would be better off were they placed in good adoptive homes. Their father is in Kalamazoo State Hospital and I have been told that he is incurable. The children need security that I cannot give them.'

"On May 21, R. A. Morter, Superintendent of the Kalamazoo State Hospital, wrote this Court as follows:

Exhibit A

"'I have your letter of May 20th and wish to inform you that Gordon Harmsen was admitted to this hospital on June 19, 1955. He is suffering from a very serious type of mental trouble. He has shown no improvement since his admission to this hospital. He constantly talks about getting out of the hospital and earning money to support his children. We are of the opinion that he is not well enough to be released from the hospital and it probably will be a long [long] time before he will show improvement. If he ever recovers sufficiently to be released from the hospital, he is quite likely to have a recurrence of his mental trouble.'

"The mother appears to have no real mother love for these children and showed no concern about giving them up; in fact, she seemed to want to be rid of them.

"Recommendation: As these children are very much in need of security which neither parent is able to give them, I recommend that they be committed to the Michigan Children's Institute for the purpose of adoption.

"(s) Frances M. Milton
"Frances M. Milton,
"Asst. County Agent."

"Dated: June 2nd, 1954."

At the hearing on June 2, 1954, the probate judge had this report before him, as indicated by the order he subsequently entered. He had before him also the sworn petition of the children's mother reciting the essential elements constituting neglect and dependency. He had before him also the letter previously quoted from the father of the children indicating the need of the children for a home. This record does not disclose either prior to the hearing, or at the hearing, or in the 2 years subsequent to the hearing, any dispute of any essential fact alleged in the petition and sworn to by the mother, and substantiated by the county agent's report.

As we have seen above, service had been had upon the necessary parties and a sworn petition in proper form

had been filed alleging the essential jurisdictional facts in a dependent and neglect proceeding under the juvenile code. The statutorily-authorized report of the county agent, based upon investigation of the facts alleged in the petition, in the absence of dispute over any jurisdictional fact, constituted a proper basis for the juvenile court's acceptance of jurisdiction. The juvenile code authorizes informal hearings. C. L. 1948, § 712A.17 (Stat. Ann. 1955 Cum. Supp. § 27.3178 (598.17). While jurisdictional facts must be established by sworn evidence where disputed, this Court has long held in juvenile proceedings that the formal taking of evidence is not required under the fact situation outlined above. In re Broughton, 192 Mich. 418, 158 N.W. 884.

In the instant proceedings, it also appears that Attorney Donald J. Dick appeared representing the mother, and as representative of the guardian of the estate of the father with prior advice to him of his intention to do so. Mr. Dick sought an order from the court adjourning the adoption proceedings until the father had time to secure representation of an attorney of his own choice.

The order entered at the June 2 hearing by the probate court judge takes on added significance with these additional facts:

"In the Matter of

David Harmsen
Roger Harmsen
Ruth Harmsen

"Petitions having been filed in said court concerning said juveniles and due notice thereof having been given as required by law, and it appearing to said court after a full investigation that the final disposition in this case should be postponed for further inquiry,

"It Is Therefore Ordered, That this case be adjourned indefinitely, but that the children remain under the jurisdiction of this court until further action is taken."

The probate judge did not, as required by statute, specify whether the children were taken in temporary or permanent custody (C. L. 1948, § 712A.20 [Stat. Ann. 1955

Cum. Supp. § 27.3178 (598.20)]), or, as allowed by statute, specify the applicable disposition (C. L. S. 1956, § 712.18 [Stat. Ann. 1955 Cum. Supp. § 27.3178 (598.18)]). Among the dispositions under this section is

> "(c) Place the child in a suitable boarding home, which if a home of persons not related to said child shall be licensed as provided by law."

The record reveals that this was what was done, and that David Harmsen was placed with Dr. and Mrs. Deane Fizzell, and Ruth Harmsen was placed with Mr. and Mrs. William Johnston. It appears that the Fizzells never sought any reimbursement from the county for their care of David. The file does not disclose any order signed by the probate judge in relation to David's placement there. The file does disclose, on September 1, 1955, an order from the probate judge reciting:

> "It Appearing, That Ruth Harmsen, under the jurisdiction of this Court has been in a free boarding home for over a year pending final disposition.
>
> "It Now Appears, That the boarding home parents are requesting some reimbursement
>
> "It Is Therefore Ordered, That the County pay Mrs. Wm. Johnston, R. #1, Benton Harbor $1, per day for the partial support of this child."

It is plain from the wording of the original order that the probate judge did not contemplate permanent custody or severance of parental rights, and has never up to this date undertaken to enter such an order.

We view the order of June 2, 1954, as an order taking jurisdiction over these children on the basis of facts of neglect and dependency alleged in the petition for purposes of temporary custody. As such, it was final and appealable.

We likewise view the order as defective and voidable (or subject to correction) on appeal for failure to meet the statutory requirements cited above.

We do not, however, consider the order void since in our view the probate court plainly had jurisdiction as to the children on the facts before him, and since he was

authorized by statute to assume jurisdiction over the children concerned.

What we have said to this point would warrant the conclusion that, a return having been made before the circuit judge to the writ of habeas corpus indicating that the children were under the jurisdiction of the juvenile court by virtue of process issued by said court within its proper jurisdiction, the circuit judge should have remanded them to custody of the juvenile division of the probate court and dismissed the habeas corpus proceedings. The habeas corpus act provides in part:

> "It shall be the duty of such court or officer forthwith to remand such party, if it shall appear that he is detained in custody, either:
>
> • • •
>
> "2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction • • •" C.L. 1948 § 637.28 (Stat. Ann. § 27.2271).

See, also, C.L. 1948 § 637.8 (Stat. Ann. § 27.2251).

Up to this point in this opinion we have largely dealt with technical legal problems upon which the court below based its grant of custody of these 2 children to their father. More needs, however, to be said, for this case does not involve a criminal proceeding where the right of a person to freedom from restraint is at issue. What is sought here is the use of the writ of habeas corpus as a substitute for statutory appeal to review long past orders of the probate court or to gain a hearing *de novo* on the issues purportedly adjudicated therein.

For us to pry with legal diligence at the technical crevices in old cases which pertain to child custody and adoption matters could spring open a Pandora's box of troubles.

What is in danger of being overlooked in this legalistic approach to a habeas corpus proceeding is the cardinal principle of judicial concern for the welfare of the children involved. This has previously been a touchstone of this Court's decisions in all custody matters. As early as 1880, Justice Graves, for a Court including Justices Cooley

and Campbell, gave us this admonition as to concern for the welfare of a child in custody proceedings:

> "In contests of this kind the opinion is now nearly universal that neither of the parties has any rights that can be allowed to seriously militate against the welfare of the child. The paramount consideration is what is really demanded by its best interests. It is doing no violence to what is taught by judicial experience to assume that the disputing parties will be more alive to the satisfaction of their own feelings and interests than to the true end of the inquisition; while the innocent subject of the contention is utterly unable to speak or act for itself, and is in danger of being lost sight of in the strife for its possession. No other occasion can call more loudly for judicial vigilance in reaching for the exact truth, and in putting aside with an unsparing hand the mere technicalities of procedure." Corrie v. Corrie, 42 Mich. 509, 510, 4 N.W. 213, 214.

See, also, In re Stockman, 71 Mich. 180, 38 N.W. 876; In re Gould, 174 Mich. 663, 140 N.W. 1013; Martin v. Benzie Circuit Judge, 200 Mich. 549, 167 N.W. 13; Liebert v. Derse, 309 Mich. 495, 15 N.W. 2d 720, 722.

In the last cited case, this Court reviewed a trial court's dismissal of a writ of habeas corpus brought by a father for the return of his child to him by his deceased wife's sister and her husband. No probate court jurisdiction or order was involved. The court, in examining the record to determine whether the best interests of the child had been protected, recorded this summary of the facts pertaining to the father:

> "The testimony indicates that plaintiff and his present wife are substantial and respectable people. He is 43 years old, is regularly employed, and says that he is able to provide for the boy adequately. He owns and maintains his home, equipped with modern conveniences and located near a city park. He showed his affection for and interest in the boy by visiting him regularly while he was in defendants' care and in paying for his support for several years. His wife

said that they had redecorated a room in their home and made it into a boy's room for Karl,"

and upheld the right of the father to the custody of the son.

Our factual situation as revealed by this record is materially different in ways which may well adversely affect the future of these children. We deal here with a petition from a father recently released from commitment to a mental institution. Such medical prognosis as is revealed by this file indicates probability of recurrence. This file does not disclose any medical report upon his present mental status or the likelihood of recurrence of the former problem.

The probate court record does reveal that the petitioner in this case in fact had no home. His claim was that he was sleeping in a shed on the premises of what the exhibits disclose to be a most distinctly substandard dwelling occupied by a woman to whom he professed the intention of marriage when, as and if finally divorced from these children's mother.

While it is true that the record indicates that, with the approval of the probate court, a third child of these parents (a boy not the subject of our current controversy) has been allowed to reside with this lady after failure of previous placement attempts in relation to him, this fact alone is hardly conclusive as to the suitability of this for 2 additional children, one of whom was a girl of 6 years.

The record indicates likewise both unstable employment on the part of the father and complete lack of support in at least the preceding 3 years. While the mental commitment offers every explanation of failure of support for the period it continued, the record does not disclose any attempt on the part of the father to support the child who was being cared for at the expense of the county prior to his petition to the probate court for her return.

Most important of all, we are in danger of entering what may be interpreted as the final custody order with little, if any, evidence bearing upon the best interests of the children inasmuch as those interests are reflected by their adjustment in their successive homes and family groups.

The certified file from the probate court contains many indications of neglect of these 2 children prior to their

present placements, and likewise many indications of great improvement therein. Typical of these is a letter from David's teacher:

> "I have been very concerned since hearing that David Fizzell may be returned to the situation that he came from before he entered second grade in my room in Watervliet Schools last year.
>
> "In my teaching experience I have never had a child who was more maladjusted and nervous than David was at the beginning of the school year. He had almost no span of attention and never followed even the simplest direction. His troubled expression and frequent remarks about horrible experiences were heartbreaking. It was impossible for David to sit still long enough to do any work and he was unable to sit through a reading class. If we had had a special room in our schools David would have benefited by being in a smaller group and by having more individual attention and help with his many emotional problems. Each week there was a little improvement in his attitude and stability. It was about Christmas time that we realized at school that the affection and security that David was receiving in the Fizzell home was changing his attitude and personality. At the end of the year I felt that David was one of the best workers in my room and was becoming better adjusted.
>
> "In my teaching experience I have never known better parents than the Fizzells. There is so much love, guidance and care in their home."

This record does not indicate that the habeas corpus proceedings included the testimony of school authorities or the school records of these children in their prior placement with their parents and their subsequent placement with defendants. The record does, unfortunately disclose that the court declined the suggestion of defendants that the court interview the children themselves.

Children are not chattels to which legal title may properly be determined by a technical writ. Habeas corpus, when it involves the custody of a child, is inevitably essen-

tially equitable in its nature. In re Leu, 240 Mich. 240, 215 N.W. 384. The circuit court, in determining a disputed child custody case, has both the power and the duty to weigh all factors which bear upon the welfare of the children whose fate he must determine. In a fact situation more similar to our present situation than any other case called to our attention, and where there were no probate proceedings at all, this Court affirmed a denial of the petition for return to the parents saying:

> "However, the welfare of the child is our sole consideration and we will not base our decision upon this technical ground. The Seeneys by their own admission have contributed nothing to the support of the child for almost five years and have visited him only on rare occasions during that period. To a large extent they have abandoned him. The child has grown up in the care of the Daveys and regards them as his parents. The interests of the boy would not be served by a change in custody at this late date." In re Seeney, 330 Mich. 55, 59, 46 N.W. 2d 458, 460.

We are not unmindful of the fact that a father whose parental rights have not been legally severed, should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide.

On the basis of this record, however, we think it is essential to the future well-being of the children for the court to require this father, in seeking the return of his children, to make a showing of reasonable continuity of mental stability, of capacity for steady employment, and of the existence of a legally-constituted family and home wherein there is a reasonable possibility of proper care for his children.

My Brother relies upon In re Adams, 214 Mich. 199, 183 N.W. 241, in affirming the trial court's order of custody based on these habeas corpus proceedings. This case does indeed indicate that the proper custody of a child is in its father absent a strong showing of unfitness. But the holding in the case was denial of the writ of habeas corpus

on the grounds of a proper forum for trial of the issue of fitness in the court below.

In this matter, a petition for return of these children may be filed by the father in the juvenile division of the probate court at any time. C. L. 1948, § 712A.21 (Stat. Ann. 1955 Cum. Supp. § 27.3178 (598.21). If such a petition, upon full hearing at the probate court level, were unjustly denied, appeal to the circuit court under the terms of the juvenile code, and subsequently to this Court, is available. C. L. 1948, § 701.36 (Stat. Ann. 1943 Rev. § 27.3178 (36).

For the reasons stated, we believe the writ of habeas corpus should have been dismissed and the children remanded to the custody of the juvenile division of the probate court for the entry of proper placement orders and the determination of any proceedings pertaining to custody which may be initiated.

The judgment of the circuit court is reversed. Costs to appellants.

SMITH, VOELKER and BLACK, JJ., concurred with EDWARDS, J.

ORDER AFFIRMING CIRCUIT COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty fourth day of December in the year of our Lord one thousand nine hundred and fifty-seven.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

EDWARD M. SHARPE,
TALBOT SMITH,
GEORGE EDWARDS,
JOHN D. VOELKER,
HARRY F. KELLY,
LELAND W. CARR,
EUGENE F. BLACK,
Associate Justices.

This cause having been brought to this Court by appeal from the Circuit Court for the County of Berrien, and having been argued by counsel, and due deliberation having been had thereon, and the Court being equally divided upon the question of reversing the judgment of the Circuit Court for the County of Berrien, Thereupon in accordance with the statute in such case made and provided, It is ordered that the judgment of the Circuit Court for the County of Berrien stand affirmed. It is further ordered that no costs be awarded herein.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this ..... day of ..... in the year of our Lord one thousand nine hundred and fifty-seven.

(s) .....
Clerk.

ORDER SUBMITTING MOTION FOR REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-ninth day of January in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

LELAND W. CARR,
HARRY F. KELLY,
TALBOT SMITH,
EUGENE F. BLACK,
GEORGE EDWARDS,
JOHN D. VOELKER,
THOMAS M. KAVANAGH,
Associate Justices.

In this cause a motion for rehearing is duly submitted.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this ..... day of ..... in the year of our Lord one thousand nine hundred and fifty-eight.

(s) .....
Clerk.

ORDER GRANTING REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of March in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice.

LELAND W. CARR,
HARRY F. KELLY,
TALBOT SMITH,
GEORGE EDWARDS,
JOHN D. VOELKER,
THOMAS M. KAVANAGH,
Associate Justices.

A motion for rehearing having been heretofore submitted herein, it is hereby granted. Justices Dethmers, Carr and Kelly dissent.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of March in the year of our Lord one thousand nine hundred and fifty-eight.

(s) Donald F. Winters,
Clerk.

ORDER RESUBMITTING CAUSE WITHOUT ARGUMENT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the eighteenth day of April in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

LELAND W. CARR,
HARRY F. KELLY,
TALBOT SMITH,
EUGENE F. BLACK,
GEORGE EDWARDS,
JOHN D. VOELKER,
THOMAS M. KAVANAGH,
Associate Justices.

A motion for rehearing having been heretofore allowed herein, the cause is hereby resubmitted without argument.

STATE OF MICHIGAN—ss.

The previous decsiion involved 2 legal issues of some

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this ..... day of ..... in the year of our Lord one thousand nine hundred and fifty-eight.

(s) .....
Clerk.

EXHIBIT B
(Filed July 15, 1958)

98
APRIL TERM, 1958

STATE OF MICHIGAN
SUPREME COURT

Gordon L. Harmsen,
Plaintiff and Appellee,
vs.
Deane Fizzell, Theo Fizzell, William Johnston and Donna Johnston,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH.

CARR, J.

This case was first submitted at the June, 1957, term of Court. On December 24, 1957, the holding of the circuit judge was sustained by a four to four decision, Mr. Justice Sharpe writing for affirmance. The case is reported 351 Mich. 86. Following the retirement of Justice Sharpe on December 31st last, a motion for a rehearing was granted by a divided Court and the cause has again been submitted at the present term on the briefs and appendices of counsel originally filed.

When the case was previously before us the issues of fact involved were thoroughly considered and discussed. In his opinion Justice Sharpe set forth the legal principles at issue and his reasons for upholding the action of the circuit court. I am in accord therewith. No purpose would be served by restating those reasons or enlarging thereon. The prior disposition of the case should not be changed on rehearing.

The order of the circuit court is affirmed, with costs to appellee.

Dethmers, C. J., and Kelly, J.
Concurred with Carr, J.

SMITH, J.

This case involved the grant or denial of a writ of habeas corpus. The only issue involved in the case, as in all habeas corpus cases, was the jurisdiction of the court, here the jurisdiction of the juvenile division below. We held that there was jurisdiction. With this holding we again express our concurrence. The great historic writ is a "palladium of liberty," not a mere writ of error. Once a court has the parties and the subject matter properly before it, as did the juvenile division in this case, its jurisdiction is not so feeble that it comes or goes with procedural errors made or resisted, objections claimed or foregone, proofs withheld or deficient, judgment sound or judgment reversible. Thus we properly denied the writ and upheld the involved jurisdiction of the Berrien county probate court.

The matter of probate court jurisdiction, sitting in juvenile division, will be found discussed in more detail in the case of Fritts vs. Krugh, ... Mich.....

Reversed. Costs to appellants.

Black and Voelker, J. J.,
Concurred with Smith, J.

Edwards, J.

This matter came before the Court for decision on December 24, 1957; with the result of affirmance of the action of the circuit judge by an equally-divided Court, with Mr. Justice Sharpe writing for affirmance and the writer for reversal.

Subsequent thereto timely application for rehearing was filed and, with a change in the composition of the court, was approved by a 5-3 vote on March 4, 1958.

The previous decision involved 2 legal issues of some import: First, whether a writ of habeas corpus may properly be used to attack procedural errors in a neglect case

before the juvenile court, involving temporary custody of children, when the record clearly shows jurisdiction to hear and dispose of the case; and, second, whether in a habeas corpus proceeding pertaining to child custody, the circuit judge hearing same must, while giving consideration to the rights of a petitioning parent, take into account also the best interest and welfare of the child.

The opinion entered by the writer in Harmsen vs. Fizzell, 351 Mich. 86, and signed by 3 other members of this Court, answered the first question in the negative and the second in the affirmative. For the purpose of decision of this case on rehearing, the prior opinion is incorporated herein by reference.

The judgment of the circuit court is reversed. Costs to appellants.

Kavanagh, J.
Concurred with Edwards, J.

ORDER REVERSING CIRCUIT COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifteenth day of July in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
LELAND W. CARR,
HARRY F. KELLY,
TALBOT SMITH,
EUGENE F. BLACK,
GEORGE EDWARDS,
JOHN D. VOELKER,
THOMAS M. KAVANAGH,
Associate Justices.

This cause coming on to be heard on a rehearing heretofore granted herein and due consideration thereof having been had by the Court, it is ordered that the judgment of the Circuit Court for the County of Berrien be and the same is hereby reversed and vacated and the cause is remanded to the Court below for a complete retrial. It is further ordered that the defendants do recover their costs herein.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of December in the year of our Lord one thousand nine hundred and fifty-eight.

(s) .....
Clerk.

ORDER DENYING REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of September in the year of our Lord one thousand nine hundred and fifty-eight.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,

LELAND W. CARR,
HARRY F. KELLY,
TALBOT SMITH,
EUGENE F. BLACK,
GEORGE EDWARDS,
JOHN D. VOELKER,
THOMAS M. KAVANAGH,
Associate Justices.

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to appellants.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme
(SEAL) Court at Lansing, this 10th day of September in the year of our Lord one thousand nine hundred and fifty-eight.

(s) Donald F. Winters,
Clerk.

EXHIBIT C

STATE OF MICHIGAN
SUPREME COURT

Doyle A. Fritts, Sr., and Lileth Marie Fritts,
Plaintiffs and Appellees,

vs.

Jack H. Krugh, Marguerite Krugh, Dale Wells Graham and Inez Gertrude Graham,
Defendants and Appellants.

No. 53.
Oct. 13, 1958.

Before the Entire Bench.

EDWARDS, Justice.

> "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." [1]

With some significant exceptions, this is a companion case to that of Harmsen vs. Fizzell, 351 Mich. 86, 87 N.W. 2d 161, rehearing granted March 4, 1958, in which this Court dealt with a petition for writ of *habeas corpus* in relation to two children, heard before and granted by the same circuit judge because of procedural errors claimed to have been made by the same probate judge.

In this case, too, the circuit judge, after the hearing on the writ of *habeas corpus*, entered orders which would have the effect of removing two children from proposed adoptive homes where they had been placed by probate court authority and returning them to parental custody. The foster parents with whom the children have lived most of their lives to date appeal.

This story starts with the somewhat abrupt abandonment

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[1] Botein, Trial Judge, p. 273.

of a minor mother and two small children by her husband in July of 1952. The mother tells the story simply:

"My name is Lileth Fritts, and the wife of Doyle Fritts. I am the mother of Sally and Doyle Fritts, the children involved in this case. Sally was born December 19, 1949. Doyle was born December 17. 1951. I am 24. • • •

"Q. What is the date of your birth? A. July 25, 1931.

• • •

"Q. Directing your attention to the first day of July, 1952, where were you living? A. Watervliet.

"Q. Michigan? A. Yes.

"Q. And prior to that date was your husband living with you? A. No.

"Q. Prior to July 1 was he living with you? A. No.

"Q. Did he leave you sometime before that date that you called here at the Juvenile Division of the Probate Court? A. Yes, he left.

"Q. And was that the result of some argument you had there? A. Yes.

"Q. And how long had he been away before you came down here? A. About 2 weeks.

"Q. And during that time did you have Doyle and Sally with you? A Yes. I heard from him within the 2 weeks. I knew where he went. He went to Bald Knob, Arkansas. He had relatives there. His mother and father. To locate him I wrote his mother immediately. I had $20 while he was away. My husband gave it to me before he left.

"Q. Did you have an argument before he left? A. Yes.

"Q. And did he tell you where he was going? A. No.

"Q. Did he send you any money within that 2 weeks? A. No.

"Do you remember telling the person in charge of the Juvenile Division of the Court that you had no milk for your children? A. Yes.

"Q. Tell the court something about that? A. Well, I went to the law.

"Q. You mean the police? A. Yes.

"Q. Go on. A. And asked them to give me some milk and some money, but my husband paid it back.

"Q. Did the police at Watervliet give you some money? A. Yes.

"Q. And your husband paid them back? A. Yes.

"Q. Did you come down to the Juvenile Court alone? A. Yes.

"Q. And what happened when you went to the Juvenile Court? A. Well, I just went in and told Mrs. Malcolm that I wanted to put my children up for adoption; that I couldn't take care of them.

"Q. And did you sign anything that day? A. Yes, I signed 1 paper she made out for the children.

"Q. You signed a paper who made out? A. Mrs. Malcolm. I think that's what her name is.

"Q. The judge's name is Malcolm Hatfield, wife is Mrs. Malcolm Hatfield. Are you talki[illegible] her, or are you talking about Mrs. Milton? A. Mrs. Milton.

"Q. Let the record show that. I have in my [illegible] a file of the Juvenile Division of the Probate Cou[illegible] Berrien County, which is in evidence, and on top show you a paper and ask you if your signature appears on that paper? A. Yes.

"Q. Is that the paper you refer to when you say you signed a paper? A. Yes.

"Q. Did you read all this before you signed it? A. Yes.

"Q. And that is what you told Mrs. Milton? A. Yes.

"Q. Where were your children that day? A. They was with my sister.

"Q. You left them with your sister? A. Yes.

"Q. Did you have occasion to go to court later? A. Yes.

"Q. How many days later? A. I went 2 days later.

"Q. What was the purpose of that call? A. The

same thing. I wanted to see if they was going to put them up for adoption. I knew I couldn't take care of them.

"Q. You asked them that? A. Yes. They told me they wanted me to sign adoption papers for the children. Two days later I signed another paper, 1 in front of Judge Hatfield, the adoption paper he wanted me to sign. This is the paper, I am speaking of, where I asked for the appointment of Hazel Wallsmith as guardian ad litem. That was what I signed that day. I signed the 1 in front of Judge Hatfield, July 3d. These 2. I told them how old I was.

"Q. Now, I show you another paper in this file which bears the signature of Lileth Marie Fritts and ask you if your signature appears on this paper which I will read. A. Yes.

"Q. (Reading): 'The undersigned being the mother of the said legitimate minor child and having legal authority to make and execute this consent, do hereby consent to the adoption of said child and the change of name of said child, as prayed for in petition of said court'. Did you sign that?

"The Court: What is the date of that?

"Mr. Leckner: The date is July 2, 1952; and that has to do with Doyle, and you signed another just like it for Sally? A. That's right, signed for both. Hazel Wallsmith signed that at the same time. I left Watervliet and went to my sister's after the 1st of July. I stayed there a day after he left and I stayed with her until I went back to my husband. I went back to him about 2 weeks after I gave my children up. I brought my children down here and I went to Wichita, Kansas. My husband was there."

The sworn petition signed by the mother on July 1, 1952, served to place most of these facts before the probate court:

"State of Michigan,

"Cause No. .....

"The Probate Court for the County of Berrien
Juvenile Division.

Exhibit C

"In the Matter of the Petition Concerning Sally Ann Fritts

Doyle Almo Fritts, Jr.
Minor.

"I, Lilith Marie Fritts, respectfully represent that I reside in the U. S. 12 2nd house from Long's Television of Watervliet in said County, and make this petition as mother

"I further represent that said children are residents of Watervliet in Berrien County, and is now residing with and under the custody and control of mother and father and ..... was born on

Sally, was born Dec. 19, 1949
Doyle was born Dec. 17, 1950

"I further represent upon information and belief that said children's father has quit his job. He has told me that he doesn't want his children. He drinks continually and beats me up which frightens the children. The father of these children said he was going to Bald Knob, Arkansas. c/o with Mr. and Mrs. Lester Fritts I had to appeal to the police at Coloma last week for milk for the *Chilren* "I would like to put the children in an adoptive home where they will be well cared for.

"I further represent that the names, relationship, ages and residences of nearest of kin and guardian of said child ....., as I am informed and believe, are as follows:

Name — Doyle Almo Fritts, Sr.; Relationship — father; Residence — Last known Probable Address: Bald Knob, Ark. c/o Lester Fritts.

"Name — Lilith Marie Fritts; Relationship — mother (Winans Ave); Residence — going to live with Frances Bridgman, Chicago Ave. Bus Benton Harbor or to New Carlyle, Ind. c/o Mrs. Wm. Webb.

Exhibit C

"I therefore, pray that the Juvenile Court take jurisdiction of said child.

"/S/ Mrs. Doyle Fritts,
"P.O. Lilith Marie Fritts".

It appears clear, however, that prior to hearing upon this petition the mother rejoined her husband at his former home in Bald Knob, Arkansas, and that they then determined to seek return of their children. On receipt of notice of hearing on the adoption petition, the father wrote the probate judge:

"7-22-52

"Mrs. Malcolm Hatfield

"I am writing to you regarding my children Sally Ann Doyle, Jr. Me and my wife have talk things over we have decided to make a home for are children. Wish to know if we could get them befor the 4th of August. If so write and let me know soon.

"Your Truly
"Doyle Fritts

"My add —
"Doyle Fritts
"5247 N. Arkansas St.
"Wichita, Kansas."

And when the hearing date of August 4, 1952, arrived, Mr. and Mrs. Fritts and her mother were in the courtroom. Mr. Fritts' version of that hearing is as follows:

"After I wrote this letter to the Probate Judge I came to St. Joseph. I appeared in the Judge's office on August 4th. The Judge wrote to me and told me when the hearing would be held, so I was here. There was no stenographer in the Judge's office when I appeared. There was no lawyer representing me. Nobody suggested to me that I get a lawyer. I was not sworn. My wife was not sworn. No one was sworn. I said there was no stenographer there.

"Q. Tell us what happened when you were in the

room there? A. Mrs. Milton read the copy of the paper she had there, and when she got through reading it the Judge told us within, after 6 months time, if we got along good, he would see that we got the kids back."

The report read by the county agent, Mrs. Frances Milton, recited the facts previously referred to above. Her report also detailed three separate conferences at which she and the probate judge had unsuccessfully attempted to dissuade the mother from her announced intention of giving up the children. The report was apparently drafted, however, before advice of the reconciliation of the parents and their decision to seek to regain their children. The report concluded:

"Recommendation: In view of the preceding, I recommend that, for the future security of these children, they be made permanent wards of this court and committed to the Michigan Children's Institute for the purpose of that institution giving consent to their adoption."

Mrs. Milton, the assistant county agent, gave testimony pertaining to the August 4th hearing not much different from that previously quoted from the plaintiff:

"Q. Now, at the time of the hearing on August 4, I understand that you were present, Mrs. Milton? A. I was.

"Q. And on that occasion was Mr. Fritts present? A. I think that was the date he was present, yes. And, Mrs. Fritts and her mother from Indiana. On that occasion I read the report, in the presence of all those people. The Probate Judge was present.

"Q. And did Mr. and Mrs. Fritts say anything about the report, about the truth or falsity of it on that occasion? A. Not to my remembrance.

"Q. And what, if you remember, did the Judge say or do on that occasion while the Frittses were there? A. Well, he talked with them a while, and then at the end he gave his decision, and whenever — I'm not a stenographer, but whenever Judge Hatfield

Exhibit C

gave his decision at the end of anything I always asked him to repeat it slowly so that I could get it down word for word; and I read it back to him word for word so that he knew I had it down verbatim as he gave it, his decision.

"Q. And that happened on that occasion? A. Well, I always did that, so I am sure I did it that time.

"The Court: What was his decision on that occasion? A. My remembrance is that he wished to find out whether the children would adjust in the new homes to which they had been sent.

"The Court: They had been there a few days? A. Oh, yes. And if they didn't adjust in those homes and if at the end of a period of time, in case the children did not adjust in those homes, and if the natural parents could prove that they were capable and willing, able in every respect to give them desirable homes, then they would be the first in line to be considered."

At the end of the hearing, the probate judge entered the following order pertaining to Sally Ann and a similar one pertaining to Doyle:

"It Is Hereby Ordered, That the said Sally Ann Fritts be and she is hereby made a Permanent ward of this court and is hereby committed to the Michigan Children's Institute at Ann Arbor, Michigan, subject to the rules and regulations governing that institution, and for the purpose of adoption.

"And It Is Further Ordered, That should this child for any reason fail to adjust in her present environment, and should the natural parents at that time prove that they have been able to reestablish a satisfactory family life and are then able to properly care for this child, they will be first in line for the replacement of this child."

[1] It should be noted that these orders, by making these children "permanent wards" of the probate court, if valid, acted to sever all parental rights of these parents to these children. C.L. 1948, § 712A.20 (Stat. Ann. 1957 Cum. Supp. § 27.3178 [598.20]).

The *habeas corpus* proceeding before the circuit court and this appeal before us pose the question squarely as to whether these orders were valid. (It should be noted that, although petitions are pending, no subsequent adoption orders have ever been entered.)

[2] The trial judge's opinion found the order of the probate judge void because the notice to the parents of the hearing did not refer to commitment to the Michigan Children's Institute.

We do not agree. The notice did tell the parents that the hearing contemplated was upon the subject of permanent custody and adoption. No more specific information could have been given to tell them that their parental rights as to their children were at stake. In the event the court found the necessary facts to establish its jurisdiction over the children, various dispositions were available to the probate judge under the statute (C.L.S. 1956, § 712A.18 [Stat. Ann. 1957 Cum. Supp. § 27.3178 (598.18)]). It was not essential for the notice of hearing to contain reference to any particular method of adoption.

[3] Nor do we feel that the petition upon which the hearing was based was inadequate to allege jurisdictional facts of neglect. See Harmsen v. Fizzell, supra, 351 Mich. at pages 95-97, 87 N.W. 2d at page 165.

In short, we find no procedural deficiency in this record of sufficient substance to warrant the use of *habeas corpus;* and we note again:

> "For us to pry with legal diligence at the technical crevices in old cases which pertain to child custody and adoption matters could spring open a Pandora's box of troubles." Harmsen, supra, 351 Mich. at page 106, 87 N.W. 2d at page 171.

After this much has been said, it still is true that there is revealed on this record a glaring defect of substance which undoubtedly moved the circuit judge to his basic decision in this case and which serves to justify his use of the remedy of *habeas corpus.*

A distinguished group of juvenile court judges has recently published a careful study of juvenile court proceed-

ings. In it the characteristics of a juvenile court hearing are noted:

> "There are 3 aspects to a juvenile court hearing, 2 of which are purely legal and the 3d socio-legal. They are: 1) the determination of jurisdiction to hear the case; 2) the adjudication of the issue of delinquency, neglect (or dependency); and 3) the determination of disposition.
>
> "It is necessary first to determine the jurisdictional facts, i.e., that the alleged act falls within the purview of the statutes fixing the court's jurisdiction of the subject matter, and that all necessary parties have been given due notice so that the requirements of due process have been met.
>
> "Having determined that the court has jurisdiction of both subject matter and person, the court should then proceed to determine the facts." National Probation and Parole Association, *Guides for Juvenile Court Judges*, pp., 59, 60.

[4] We believe the probate court had jurisdiction of the persons and the subject matter for purposes of hearing the neglect complaint. The children resided in the county concerned. The essential parties had notice. The mother's petition in the instant case served to allege neglect and dependency of the two children. The essential facts alleged were the father's abandonment of her and them, the break-up of the family and the absence of any support for the children.

When the day set for hearing arrived, however, the probate court was on ample notice that the facts pertaining to neglect had changed materially and that the question of the court's right to take custody of these children was in dispute. In the absence of legal representation, the father's letter of July 22d should have been regarded as placing the issue of neglect in dispute.

[5] Where jurisdictional facts are in dispute, even though the statute authorizes informality of hearing (C.L. 1948, § 712A.17 [Stat. Ann. 1957 Cum. Supp. § 27.3178 (598.17)]), a final order of permanent custody acting to sever all parental rights must be based on legal evidence

and cannot be based on hearsay and report alone. Harmsen, supra, 351 Mich. at page 103, 87 N.W. 2d at page 169; In re Hill, 78 Cal. App. 23, 247 P. 591.

See, also, People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 86 A.L.R. 1001; In re Mantell, 157 Neb. 900, 62 N.W 2d 308, 43 A.L.R. 2d 1122.

> "Where there is a dispute about the basic facts, adult witnesses should be sworn. Placing of children under oath should be in the sound discretion of the court, subject to statutory provisions, if any. It is good policy to permit parents, the child, and witnesses to give testimony in narrative form with as few technical objections as possible. It should be remembered, however, that the juvenile court hearing is not a criminal, but essentially and legally a civil proceeding of a chancery nature, and the rules of equity procedure and evidence should be followed. Unimportant technicalities need not be emphasized. In addition, the judge should eliminate hearsay and accept the testimony of competent witnesses only. Guaranteeing the basic rights of the individual is a responsibility of the judge even though the child or his parents may not be aware of or claim them at the time." National Probation and Parole Association, Guides for Juvenile Court Judges, p. 61.

The glaring defect in this proceeding to which we have referred pertains to the evidence (or lack thereof) presented at the hearing upon which the probate judge based his order.

[6] We note at the outset that the probate court has no inherent powers. Its right to take jurisdiction of children and to govern their lives is based entirely on Constitution and statute. The Michigan Constitution (1908), art. 7, § 13, provides that:

> "In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents."

Our Michigan statute provides:

> "Except as provided herein, the juvenile division of the probate court shall have:
>
> • • •
>
> "(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county
>
> "(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals or well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship." C.L.S. 1956, § 712A.2 (Stat. Ann. 1957 Cum. Supp. § 27.3178 [598.2]).[2]

Another section provides, in cases where neglect or dependency is established, for the court to enter either temporary or permanent custody orders:

> "The court in all cases involving custody shall state in the order for disposition or any supplemental order of disposition whether the child is placed in the temporary or permanent custody of the court. If the child is placed in the temporary custody of the court, no supplemental order of disposition providing permanent custody, or containing any other order of disposition shall be made except at a hearing pursuant to issuance of summons or notice as provided in sections 12 and 13 of this chapter. If the child is placed in the permanent custody of the court, all parental rights are terminated, though such rights may be reinstated by a supplemental order of disposition." C.L. 1948, § 712A.20 (Stat. Ann. 1957 Cum. Supp. § 27.3178 [598.20]).

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[2]Prior to the amendment by P. A. 1953, No. 193, this matter was contained in subdivision (a) (6) of C. L. 1948, § 712A.2.

[7] There must, therefore, be some testimony of neglect before the probate court has the power to take jurisdiction of the child and to enter valid order under the disposition section of the code (C.L.S. 1956, § 712A.18 [Stat. Ann. 1957 Cum. Supp. § 27.3178 (598.18)]).

After some consideration of the problem, we distinguish here between the testimony which would afford support for an order taking temporary custody for reasons of neglect and that necessary to support a permanent custody order.

Such a distinction may not be found clearly spelled out in the statute (§ 20) quoted above. Yet we note the obvious unconstitutionality of the statute if facts of purely temporary neglect could suffice to support the entry of a permanent custody order severing all parental rights. Where, for example, a wholly normal family is confronted with the sudden emergency of a house destroyed by fire — the proven lack of proper shelter for the children for the next 24 or 48 hours could not, under our concept of due process, support an order of the court taking permanent custody and severing all parental rights.

[8] We seek to save legislation from unconstitutionality wherever possible by reasonable and permissible interpretation. People v. Piasecki, 333 Mich. 122, 52 N.W. 2d 626; Cady v. City of Detroit, 289 Mich. 499, 286 N.W. 805; Thompson v. Auditor General, 261 Mich. 624, 247 N.W. 360; Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S. Ct. 816, 81 L. Ed. 1143; National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688.

[9] Here, we find the legislative intent plainly set forth in the use of the words "temporary" and "permanent." In accordance with that legislative intent, we hold that, while evidence of temporary neglect may suffice for entry of an order taking temporary custody, the entry of an order for permanent custody due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future.

In our instant case, at the time of hearing, the probate judge had before him no evidence of neglect, either of long duration in the past, or from which any reasonable predic-

tion of future neglect of permanent duration could be made. The order taking permanent custody of these children clearly exceeded the statutory authority of the court and was void.

[10] Even where, as here, a court has jurisdiction of the persons and the subject matter, an order affecting personal liberty which clearly exceeds the court's statutory authority may be attacked by habeas corpus. In re Mills, 131 Mich. 325, 91 N.W. 356; In re Allen, 139 Mich. 712, 103 N.W. 209; In re Nowack, 274 Mich. 544, 265 N.W. 459.

See, also, Freedman v. Freedman, 303 Mich. 647, 6 N.W. 2d 924; In re McKinney, 326 Mich. 190, 40 N.W. 2d 114; In re Mills, 135 U.S. 263, 10 S. Ct. 762, 34 L. Ed. 107; In re Bonner, 151 U.S. 242, 14 S. Ct. 323, 38 L. Ed. 149; 25 Am. Jur. Habeas Corpus, §§ 78, 79, 80 and 83.

We hold that the orders entered by the probate judge taking permanent custody of these children were void for want of proof of essential jurisdictional facts of neglect.

Nor did the provisional aspect of the order serve to obviate its basic invalidity. It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and the question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children.

In the absence of evidence of neglect such as we have referred to, the very preamble to the sections of the probate code dealing with juveniles establishes the strong preference for parental custody.

> "While proceeding under this chapter, the probate court shall be termed the juvenile division of the probate court.
>
> "Proceedings under this chapter shall not be deemed to be criminal proceedings.
>
> "This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive such care, guidance and control, *preferably in his own home*, as will be conducive to the child's welfare and the best interest of the state and that when such child is removed from the control of his parents the court shall secure for him

care as nearly as possible equivalent to the care which should have been given to him by them." C.L. 1948, § 712A.1 (Stat. Ann. 1957 Cum. Supp. § 27.3178 [598.1]).

[11] There must be real evidence of long-time neglect, or serious threats to the future welfare of the child, to overthrow permanently the natural and legal right of parents to the custody and nurture of their own children. C.L.S. 1956, § 703.6 (Stat. Ann. 1957 Cum. Supp. § 27.3178 [206]); In re Goldinger, 207 Mich. 99, 173 N.W. 370; Burkhardt v. Burkhardt, 286 Mich. 526, 282 N.W. 231; Riemersma v. Riemersma, 311 Mich. 452, 453, 18 N.W. 2d 891. Such rights are not subject to termination as a result of a brief marital dispute, or even by a temporary period of desertion by one of the parents.

In Harmsen, supra, 351 Mich. at page 110, 87 N.W. 2d at page 173, we said:

> "We are not unmindful of the fact that a father whose parental rights have not been legally severed, should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide."

On the present record, there was even greater reason for society to attempt to help reunite and restore this family. We are not unmoved by the plight of the foster parents and by the possibility of real damage in the lives of these two children. The circuit judge noted:

> "The testimony taken at the hearing in this court discloses that Jack H. Krugh and Marguerite R. Krugh and Dale Wells Graham and Inez Gertrude Graham, now providing homes and care, support and education for Doyle Elmo Fritts and Sally Ann Fritts, respectively, are as qualified in every respect as foster parents of said children as it is possible to obtain They are all giving a full measure of devotion, love and affection to these children as a spirit of unselfishness and self sacrifice that leaves nothing for challenge. The children themselves are shown to be well

adjusted and happy in their present environment, fully responsive to the excellent care they are receiving from these foster parents."

It is greatly to be regretted that the original appeal from the denial of a motion to vacate the permanent custody order was not promptly brought to issue. We cannot, however, say on this record that these parents of limited education and means had ever abandoned their efforts to regain their two children.

We also note such testimony pertaining to recent years as bears upon the fitness of the parents. Two more brief separations of man and wife in 1955 were followed by prompt reconciliation. The basic facts appear to be that the father and mother of our two children have lived together in the intervening years; that he has worked steadily and supported his family; that she has kept house and borne two more children; and at the time of hearing before the circuit court there was a history of an intact family marred by three marital arguments and brief separations. We are not prepared to say that these of and by themselves suffice to prove such unfitness as would have required the circuit judge to dismiss their petition.

[12] We regard *habeas corpus* proceedings pertaining to custody as essentially equitable in nature. In re Leu, 240 Mich. 240, 215 N.W. 384; Harmsen vs. Fizzell, supra. We affirm the decision of the circuit judge but remand these matters for the entry of orders allowing a reasonable time for the transfer of physical custody from the present foster parents to the parents under the supervision of the appropriate arm of the court with the purpose of occasioning as little damage as possible in the lives of these children.

Modified and affirmed. No costs.

Addendum

In view of the important human and legal issues posed by this case and the conflicting opinions herein, those who sign this opinion desire to re-emphasize several points.

The circuit judge who heard the petition for the writ of *habeas corpus* found the orders of the Berrien county probate court juvenile division to be void, and in the course of

our appellate process his decision on this point is before us for review. These orders were entered August 4, 1952.

Let us carefully note the state of the record before the probate court on that date. There was a sworn complaint. Its allegations of neglect and dependency were disputed by the parents who, reunited, were present in the courtroom to contest it. As far as this record discloses, no witness was called except the county agent whose report was based largely on what she had been told. Nothing resembling legal evidence was offered to establish abuse of or neglect of the children. Such *charges* as the record contains pertaining to the father's treatment of the mother have apparently never been tried in any court and, while uttered under oath in complaint form by the mother, have never been repeated by her in the husband's presence with right of confrontation and cross-examination. In effect, the mother's own statements about her husband in the midst of a marital dispute repeated in hearsay form have been employed to defeat her own efforts to regain custody of her children. We reiterate that where the fundamental facts of neglect are in dispute, our Constitution and statute require some legal evidence to support the court's assertion of jurisdiction.

We again make reference to the disputed orders which we have previously held void:

> "It Is Hereby Ordered, That the said Sally Ann Fritts be and she is hereby made a Permanent ward of this court and is hereby committed to the Michigan Children's Institute at Ann Arbor, Michigan, subject to the rules and regulations governing that institution, and for the purpose of adoption.
>
> "And It Is Further Ordered, That should this child for any reason fail to adjust in her present environment, and should the natural parents at that time prove that they have been able to re-establish a satisfactory family life and are then able to properly care for this child, they will be first in line for the replacement of this child."[3]

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[3]A similarly-worded order was entered in relation to Doyle Fritts.

The concept of the relationship of his court to the family entertained by the probate judge, and exemplified in his orders, is one for which we find no warrant in the law of this State or, for that matter, any one of these United States.

It will be noted that these orders do not indicate a final judgment on the part of the probate judge on the facts presented to him that the parents are either unable, unwilling or incapable of offering a proper home and guardianship to these children. On the contrary, the orders on their face suggest the conclusion that, while the parents may well prove to be proper custodians for their own children, the probate judge had in his view succeeded in finding parents for each of them who were superior to those whom nature and Deity had provided.

We have previously noted the strong preference for parental guardianship in the prefatory paragraph to the juvenile sections of our probate code and in our Michigan case law. In a recent case, the supreme court of Minnesota phrased this preference thus:

> "It is too well settled to require citations that the right of a parent to the custody of a child is paramount or superior to that of any other person; that a mother is presumed to be a fit and suitable person to be entrusted with the care of her child; and that the burden of disproving this presumption rests upon the person challenging it." In re Larson, Minn., 91 N.W. 2d 448, 453.

[13] We believe that no such discretion as these orders seem to assert is vested by the law of this State in a probate judge sitting in the juvenile division, absent facts upon which a finding could be made that the natural and legal parents of a child had become incapable of discharging the duties of parenthood according to the accepted standards of society, or had by their own conduct so neglected, abused or abandoned their children as to constitute an abdication and waiver of their rights of parenthood.

In our view the orders entered were beyond the statutory power conferred upon the probate judge and were

void. In the language of our *habeas corpus* act, "the jurisdiction of such court * * * has been exceeded." C. L. 1948, § 637.29 (Stat. Ann. § 27.2272).

We now turn to the concept of the writ of *habeas corpus* at issue in this case. There is no need to recite the great use in the history of the development of freedom which the courts have made of this writ of last resort. Nor do we think our State or nation have reached such a point of civilized development that the powers exercised under this writ should now be narrowly circumscribed.

The suggestion is made to us that the Court which hears a writ of *habeas corpus* and finds a court order offered in justification of the detention or deprivation of freedom concerned, may only inquire as to whether or not the other court had jurisdiction in the narrow sense of (1) jurisdiction of the persons; and (2) jurisdiction of the subject matter of the dispute. This view would have the advantage of resolving many past varying usages of the word "jurisdiction". But it has the disadvantage of depriving the courts in a hearing on a writ of *habeas corpus* of the power to strike down an unjust order which is patently *ultra vires*, or an order entered in obvious violation of constitutional rights. The United States supreme court has many times, in cases of great historic importance, employed a broader concept of the power of *habeas corpus*. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; In re Nielsen, 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118; Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543; Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Bowen v. Johnston, 306 U. S. 19, 59 S. Ct. 442, 83 L. Ed. 455; Walker v. Johnston, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; Wade v. Mayo, 334 U. S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647. This Court has likewise employed the same broad view of the powers of the writ of *habeas corpus*. In re Mills, 131 Mich. 325, 91 N.W. 356; In re Allen, 139 Mich. 712, 103 N.W. 209; In re Nowack, 274 Mich. 544, 265 N.W. 459; Freedman v. Freedman, 303 Mich. 647, 6 N.W. 2d 924; In re McKinney, 326 Mich. 190, 40 N.W. 2d 114; In re Maddox, 351 Mich. 358, 88 N.W. 2d 470.

In discussing arguments for restrictions upon the use of the writ of *habeas corpus*, Mr. Chief Justice Hughes said:

"But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner had assumed jurisdiction necessarily deprives another court of authority to grant a writ of *habeas corpus*. As the court said in the case of [Ex parte] Coy, supra [127 U. S. 731], pages 757, 758, 8 S. Ct. [1263], page 1272 [32 L. Ed. 274], the broad statement of the rule was certainly not intended to go so far as to mean, for example, "that because a federal court tries a prisoner for an ordinary common-law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, that he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction.' Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record (see In re Snow, supra [120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658]; Ex parte Hans Nielsen, Petitioner, supra [131 P. S. 176], page 183, 9 S. Ct. [672]) page 674), and the remedy of *habeas corpus* may be needed to release the prisoner from a punishment imposed by a court manifestly without jrisdiction to pass judgment.

"It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. Ex parte Lange, supra [18 Wall. 163, 21 L. Ed. 872]." Bowen v. Johnston, 306 U. S. 19, 26, 27, 59 S. Ct. 442, 446.

We hold that the orders entered upon the record of this hearing, as certified to us by the participating parties, represented an erroneous concept of the power conveyed by statute upon the probate court sitting in juvenile division, and that, being based upon no evidence of permanent neglect, they represented a fundamental miscarriage of justice as to these petitioners and exceeded the statutory N.W. 459; Freeman v. Freedman, 303 Mich. 647 6 N.W. 2d powers of the probate judge who entered them.

As indicated previously, we likewise hold that a permanent deprivation of parental rights, based upon the record certified to us here, would represent, if authorized by statute, a violation of due process of law as far as these parents are concerned.

We believe that these petitioners presently have no other remedy than the petition for the writ here considered. The suggestion that a motion to restore parental rights once lost is the equivalent of the right to contend that such rights were severed in violation of both statute and Constitution does not in our view require more than the noting of our disagreement.

We have previously indicated that after determining the legal issue pertaining to the permanent custody orders attacked by the writ of *habeas corpus* before him, the circuit judge had the additional duty, since *habeas corpus* proceedings in relation to custody of children are essentially equitable in nature, to concern himself with the welfare of the children as of the time he heard the case. We find no reason upon the record written before him to hold that he failed in his duty in this regard.

It is, of course, obvious that what we decide in relation to this case becomes *res adjudicata* only as to the issues which were litigated and decided at the circuit court hearing on the petition for writ of *habeas corpus*, and that it constitutes no prejudice to any rights which the parties may have to call the attention of the proper courts to facts, if any, which raise issues not disposed of there.

DETHMERS, CARR and KELLY, JJ., concurred with EDWARDS, J.

BLACK, Justice (dissenting).

I make bold to say that, on review here of habeas corpus proceedings instituted for the purpose of determining custody of children of tender years,[1] our first act should be

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[1]This case concerns the jurisdiction of Michigan probate courts, sitting in juvenile division, under the act of 1944 as amended (P. A. 1944, 1st Extra Session, No. 54). By the act a new chapter, "to stand as chapter 12a thereof",

that of self-appointment of this Court as a sort of temporary guardian of the rights and interests of the diminutive and tragically interested party or parties for whom — as a rule and as here — no counsel appears. In this case the natural parents (formerly of Arkansas, late of Michigan, and now of Kansas) vie with the would-be adoptive and six-year-continuous foster parents for immediate as well as final custody of two little children. In the shadowed valley between these grimly contentious forces walk the innocent and utterly defenseless sister and brother known in this record as Sally Ann and Doyle Elmo Fritts. We may well liken their position to that of Hansel and Gretel in the forest. No guardian or counsel stood by their side in the courts below. None speaks to us now in their separate behalf. Send well to this Court, in all good time, the courage and the wisdom with which to confess the error of today's myopic majority, thus to attend the welfare and legal rights of the two. And grant that, before the inevitably ultimate right of this case comes to final if belated judgment, Sally and Doyle Fritts are still within reach of orderly process to be issued by the Berrien county probate court in accordance with such final judgment.

I fully agree with the reasoning of Mr. Justice Smith and join him in concluding that these writs of habeas corpus should be dismissed. There is more to be said, however, lest as the impending legal storm rages, as it surely will over today's wholly indefensible decision of a bare foursome sitting here, these youngsters are spirited beyond our borders and beyond effective recall of that order of recant (however mincing and equivocal it may be) we are sure to enter when the impact of majority decision becomes known in Michigan probate courts and is fully realized in our conference room. This Court and our people will never be able to live with the incredible and blindly posted doctrines the undersigned do now reject,

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was added to the probate code of 1939. In this opinion I shall refer to the chapter by section numbers. The official chapter citation is C. L. 1948, § 712A.1 et seq.; C. L. S. 1956, § 712A.1 et seq.

and the only question is one of time; time when four of our Brothers perceive — and act to correct — their grievous folly.

Cardozo tells us that judges "march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative"; that they "deplore the sacrificial rite" and perform it with averted gaze, "convinced as they plunge the knife that they obey the bidding of their office" (The Growth Of The Law, p. 66). My Brothers surely march thus here, not fully realizing what they do. Would that the Constitution required each member of this Court to personally witness the heart-sickening scene of execution of today's majority sentence; that of tearing two fear-stricken little ones from the only homes of love and care they know or remember. We might in such case recall these writs on the spot, leaving a jury to determine that which of right should be settled in Berrien county's circuit court juryroom.

Aside from the impact of today's sentence on these children, what is it that appalls us (we who have studied the *partial record* on which today's majority has written plus the *remaining record* our minority has seen fit, since submission of the case, to bring here from the Berrien county clerk's office)? It is this precise and decidedly aberrant determination of the majority:

That a Michigan court of record concededly may have jurisdiction of the parties and subject matter brought before it in an entirely proper statutory proceeding (non-criminal in nature[2]) and yet, before the day of hearing is over and for want of what to our majority is a sufficient record of supporting proof, *lose jurisdiction to proceed to judgment* (the judgment whether tainted with error or otherwise being quite within scope and range of the statute under which court and parties have assumed to proceed) *and, at the same time and by force of the same allegedly deficient record, lose jurisdiction over the subject matter* (in this case the protection and welfare of in-

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[2]Section 1 of said chapter 12a specifically declares that "Proceedings under this chapter shall not be deemed to be criminal proceedings."

fants who, in their own unrepresented right, are entitled to continued exercise of that jurisdiction to the point of final judgment or attainment by them of age 17).

Today's error will spread its inescapable contagion beyond the confines of Berrien county to the outermost boundaries of Michigan. Until we proceed to inexorable self-correction, a menacing cloud of jurisdictional doubt will have been cast upon every order hitherto issued, in juvenile division of probate (on strength of which supposedly final and happily concluded adoption proceedings may depend), where the record discloses a paucity of proof, or a dissatisfactory record of proof, or an absence of "real evidence of long-time neglect", supporting such order. And this our majority proceeds to do in the face of an ignored section of the statute declaring that the hearing in question may be informal; that "stenographic notes or other transcript" need be taken or made only when requested by counsel or ordered by the court, and that "the general public may be excluded" from such hearing (§ 17 of said chapter 12A).[3] Ah, yes, we must find a way to unfetter this habeas corpus proceeding from the hard-to-get-around and already firmly seated jurisdiction of the juvenile division over these children. The only way is the way of necessity, and we shall pursue it to sentence of the children even though necessity knows no law. Thus,

> "Man, proud man,
> Drest in a little brief authority,
> Most ignorant of what he's most assured * * *
> Plays such fantastic tricks before high heaven
> As makes the angels weep."

(Isabella's denunciation of the sentencing judge in Measure For Measure, act 2, sc. 2, lines 117-122).

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[3]In this case, and certainly by permission of the statute, no stenographic record of the hearing on August 4, 1952 was taken or made. No wonder the "record" isn't letter perfect.

Exhibit C

This case will be known in future years as Michigan's judicial wosbird of 1958 — the occasion when four members of the Supreme Court of Michigan sentenced two sinless little children to a strange and portentously darkened life in a faraway state without pretense of providing them with the fundamental rights — to counsel and jury trial — wé guarantee to the meanest of our adult citizens. Withal, the professed concern of my Brothers, for the welfare of the innocents they now condemn, is positively chilling. I turn to the record facts, including those — brought here since submission of the case — my Brothers would ignore.

Sally Ann Fritts was born at Little Rock, Arkansas, December 19, 1949. Doyle Almo Fritts was born at Watervliet (in Berrien county), December 17, 1950. In July of 1952 — this my Brothers in majority concede — the Berrien county probate court, sitting in juvenile division, became vested with statutory jurisdiction over Sally and Doyle on account of the outright tragedy of the father's neglect and desertion and the repeatedly presented plea of the mother that they receive care from the court she could not give, followed by the statutory steps my Brothers have related. They — the mother and children — had no food and the children needed milk. The little boy, then less than two years old, was suffering from impetigo and was in need of immediate medical care. The distraught mother declared to the juvenile division that she was unable to care for them and that she wanted "to put the children in an adoptive home where they will be well cared for." On the third occasion, when she sought aid in the probate office, the mother left the children there, the latter crying their forlorn grief, saying "Well, I'm leaving them anyway." This, to the undersigned, amounted to utter abandonment of forsaken waifs, yet it suggests no criticism of a desperate mother. She had little alternative and was quite destitute. The father — petitioner here for release of our gracious writs of habeas corpus — had deserted the whole family and had gone back to his original home at Bald Knob, Arkansas.

So the juvenile division proceeded to statutory hearing and entry of the orders my Brothers pronounce jurisdictionally defective. Such orders were entered under date

of August 4, 1952.[4] In fact they duplicate the juvenile division order considered in In re Snyder, 328 Mich. 277, 43 N.W. 2d 849, which order was reversed on appeal to circuit, and confirmed as against such reversal on appeal to this Court, with no question raised by anyone — including any member of this Court — as to jurisdiction of the juvenile division to enter such "permanent" order.

The record of Mrs. Fritt's troubles, since she rejoined her husband at Wichita, Kansas, is replete with more evidence upon which a constituted trier or triers of fact (distinguished from a court hearing jurisdictional questions in a habeas corpus proceeding) might well conclude that a return of custody to these parents is not yet in order.[5] On January 14, 1955, Mrs. Fritts filed her petition for divorce against Mr. Fritts in the district court of Sedgwick county, Kansas, alleging parentage of Sally Ann, Doyle Almo and Jimmy Dale (born since the probate hearing of 1952); alleging neglect of duty and cruelty on the part of Mr. Fritts and alleging that her husband "should be restrained and enjoined from molesting or annoying the plaintiff at any time." The district court thereupon issued its order restraining Mr. Fritts from molesting or annoying Mrs. Fritts, as in her bill prayed, and ordered him to pay a bi-weekly amount for "temporary child support and alimony" plus attorney fees. On June 24, 1955, Mrs.

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[4]August 18, 1952, the parents filed a petition (obviously authorized by § 21 of said chapter 12A) to set aside the orders of August 4. Such petition, after full hearing with the parents represented by counsel, was denied September 27, 1952. The parents thereupon filed certain papers in probate looking toward appeal from the order of denial but did not pursue such appeal further. This abandoned appeal of 1952 is the one to which my Brother EDWARDS refers (92 N.W. 2d 606).

[5]The point made here, and I shall come to it later, is that there as yet has been no trial of the merits of the pending statutory petition by which these parents ask restoration of them of custody of these children.

Fritts filed an amended petition, alleging birth of a fourth child (Ronald Leslie) and alleging further as follows:

> "That on January 14, 1955 plaintiff filed a petition for divorce against the defendant; that after defendant promised the plaintiff that he would discontinue his acts which constituted extreme mental cruelty and gross neglect of duty, plaintiff, relying upon these promises, took him back and they again lived together as man and wife."

In her amended petition, Mrs. Fritts went on to allege:

> "That plaintiff, since taking her husband back, has performed each and every duty devolving upon her as the wife of the defendant but he, disregarding his duties, marriage vows and promises, has been guilty of gross neglect of duty and extreme mental cruelty toward the plaintiff."

This record of continued marital discord, save only as testified later in relation to what obviously was a shaky reconciliation of the parents (see opinion of Mr. Justice EDWARDS on this), is the only information this appellate Court has before it, in this year 1958, on strength of which we are asked to approve transfer of child custody — by habeas corpus thwarting direct and pending appeal — from excellent homes and foster parents within our jurisdiction to a troubled home beyond reach of our process. Convinced that the proper forum for enlightened and legally rightful determination of such critical issue has not as yet been utilized and that it stands open to all interested parties (in the Berrien county circuit court), I will have no part in any such abuse and misuse of our constitutional writ.

First: The Question Of Jurisdictional Validity Of The Probate Court Orders Of August 4, 1952.

Mr. Justice SMITH has considered this question at length. Fully agreeing with his views, I am moved to add this: So long as jurisdiction to enter a "supplemental order of disposition" continues (and such jurisdiction of

the juvenile division remains intact to this day, so far as concerns Sally and Doyle Fritts, regardless of validity of the orders of August 4) no order — entered in juvenile division — may properly be termed as "severing all parental rights" (the quoted expression is that of Mr. Justice EDWARDS).[6] This I think was made plain, even to the legally unskilled, by the grant of continuing jurisdiction to issue supplemental orders "at any time while said child is under the jurisdiction of said court", which grant the reader will find in dovetailed seriation as shown by §§ 19, 20, 21 and 24 of said chapter 12A. Indeed, the very section my Brothers in majority rely upon echoes this necessary — when we consider the rather manifest need for continuity of jurisdiction in such cases — declaration of legislative intent. That section (§ 20) concludes: "If the child is placed in the permanent custody of the court, all parental rights are terminated, *though such rights may be reinstated by a supplemental order of disposition.*" Perforce, there is no finality of any order when the order itself, by command of a self-incorporating statute, is made subject to the retained and continuing power of the court to "affirm, modify, or set aside" any and all such orders. Witness the complementing and cooperative provisions of §§ 20 and 21 of the statute. The fate of a child in our courts is not — or at least should not be — a life or death single shot at the apple on the youngster's head like, say, the one opportunity of driving home a mechanic's lien. The statute, referring to said chapter 12A, says just that. So does even a soupcon of common sense.

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[6]Such an order — finally "severing all parental rights" — may of course be entered with the effect provided by § 9 of chapter 10 of the probate code, as last amended by P. A. 1957, No. 255, pertaining to adoption proceedings. No such order has as yet been entered in the pending proceedings (in Berrien probate) looking toward adoption of Sally by Mr. and Mrs. Graham and adoption of Doyle by Mr. and Mrs. Krugh.

Even an unanimous determination of this Court, of jurisdictional invalidity of the two orders of August 4, would in no manner support these misguided writs of habeas corpus. The juvenile division admittedly was possessed of jurisdiction over Sally and Doyle when the hearing of August 4 commenced. If its orders of that day were void for any reason — and this I vigorously dispute — the conceded jurisdiction over Sally and Doyle Fritts remained steadfast and became an appropriate subject of a new proceeding under the statute or continuation of the one rightfully commenced. Is this not clear? Well, these parents recognized and proceeded on strength of the conclusion just voiced when they filed (August 18, 1955) their statutory petition for restoration of custody and appealed to circuit from denial thereof.

This brings us to the discovered record fact of filing in probate of said petition of August 18; denial thereof in probate; due appeal to circuit (by the parents) from denial thereof; motion in circuit (by Mr. and Mrs. Krugh and Mr. and Mrs. Graham) to dismiss appeal on ground that the orders of August 4 constituted an adjudication in bar of hearing and determination of the petition of August 18; due submission of said motion to dismiss appeal; filing of the circuit judge's opinion in which he held that the motion to dismiss should be denied, and entry of order in circuit "That the aforesaid petition (of August 18) be tried on its merits *de novo*.[7] The circuit judge's opinion denying such motion to dismiss is both enlightening and sound. I concur fully with his conclusion. He ruled (quoting from his unvacated and unchallenged opinion filed March 15, 1956):

> "The question of whether or not the Probate Court had jurisdiction, or whether any of its orders as

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[7]These record facts are taken from the original and separate Berrien county circuit court file entitled "In the Matter of the Estate of Sally Ann Fritts and Doyle Almo Fritts, Jr." Such file bears Berrien circuit court No. B-1400. It now reposes, along with the record first certified here, in our clerk's office.

actually entered were res adjudicata of that question, or of any issue as to the contents and effect of such orders, becomes immaterial as applied to the situation existing now, or at least at the time of the filing of the petition denied in Probate Court which is the basis of this appeal.

"The petition appears to raise the question of the current status of these children in fact and in law. It should be heard on its merits de novo so that this court may determine the status of the children, and if then required, based on the petition as filed determine the issue of custody thereby raised.

"The motion to dismiss the appeal is denied without costs, and petitioners may prepare an order for signature accordingly."[8]

All in all it is something more than remarkable to find an appeal pending in circuit, from denial of a statutory petition for supplemental order of disposition, held in

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[8]It is suggested that we have no right to consider this additional file and that resort thereto may amount, so far as concerns the present litigant parties, to a denial of due process. To this view of due process — perforce through a small knothole — my answer is short. I am interested more in due process for these children than in misguided process for those who have brought here a curtailed and misleading record; a record which, but for the vigilance of our reporter during his customary check — against such curtailed record — of the opinions of Justices EDWARDS and SMITH, doubtless would have eliminated from sight of this Court the crucial fact that habeas corpus to settle this issue of custody has indeed and in fact been substituted for a presently pending appeal from denial of a statutory petition for settlement of the same issue. Yes, I propose to provide due process for all, children and contenders alike. It is bad enough to innocently decide a case the wrong way on account of an inadequate and error-causing record but infinitely worse to persist with such error after the decisive record facts are brought here and made known.

abeyance by one judicial hand as the other proceeds by habeas corpus in the same court to question and deny the jurisdiction of the court from which such appeal has been taken. And such is the more unseemly when the same court has just certified, as against the asserted jurisdictional question, that the pending appeal should proceed to trial for the purpose of determining the statutory and real issue all parties, including the involved children, are entitled to have settled. That issue now is whether Mr. and Mrs. Fritts, on 1958 (not 1956) proofs to be taken, are entitled by said petition (for restoration of custody) to a "supplemental order of disposition" in their favor.

Second: Should Habeas Corpus Be Interposed, And Substituted For, The Pending Appeal From Probate Court?

The case must be a rarity where any court has permitted parties to utilize habeas corpus as a means to move aside, and thus impede or supersede, regular and pending litigation in which the same issue — presented in the petition for habeas corpus — is due for settlement or overriding adjudication. Our rule, consonant with unanimous authority, is that habeas corpus cannot be substituted for appeal or error. We apply the rule — must apply it — in at least a score of cases each year when petitions for habeas corpus are brought before us to review appealed or appealable jail or prison sentences. Most surely, and in every case save this singular one involving these Berrien county children, we shall continue to apply it *when it is shown that an appeal aimed at the relevant point of adjudication is pending and waiting trial.*

In the recent and duplicating case of Harmsen vs. Fizzell, 351 Mich. 86, at page 106, 87 N.W. 2d 161, at page 171, Mr. Justice Edwards, supported by this writer and two other members of the Court found occasion to consider the general rule to which I refer. After having treated "technical legal problems" brought here in Harmsen to test jurisdiction of the same juvenile division, our Brother went on to say:

> "More needs, however, to be said, for this case does not involve a criminal proceeding where the right

of a person to freedom from restraint is at issue. What is sought here is the use of the writ of habeas corpus as a substitute for statutory appeal to review long past orders of the probate court or to gain a hearing *de novo* on the issues purportedly adjudicated therein."

I rise to remark that Harmsen was a proceeding in habeas corpus, wherein four present members of our Court headed by Justice Edwards wrote to sustain Berrien county probate (juvenile division) jurisdiction — as against habeas corpus in Berrien circuit — on this sound premise: "Children are not chattels to which legal title may properly be determined by a technical writ." Yet here our Brother writes to yield juvenile division jurisdiction over — as well as jurisdictional title to — these children, and to do so by issuance of "technical writs." And this he does after having just extolled the superior virtues and advantages of the juvenile division, with its "special jurisdiction, special powers of disposition, and specialized staffing as to children's problems in dependency and delinquency cases." Sovereign v. Sovereign, Mich., 92 N.W. 2d 585. *Quid est?* Or is there something "special" about the jurisdiction of the Berrien juvenile division which requires that its advantages be applied to Ruth and David Harmsen but not to the equally needful Sally and Doyle Fritts?

Third: The Immediate Welfare Of These Children.

Aside from the above we come to the always-controlling question of present welfare of these children. If, as this Court rightfully declares with reiterant monotony in child custody cases, our prime goal is the greatest good we can do by the child, then Sally and Doyle Fritts should remain in these foster homes pending orderly trial, preferably by jury, of the statutory issue their parents have voluntarily submitted to the juvenile division and brought to the circuit court by appeal. We need not dwell upon the parlous and uncertain life into which these infants — judging from this not-up-to-date record — will be thrust should they be sent by these writs to Kansas. We need not describe the praiseworthy environment of Sally's life

since she was enabled — just six years ago — to enter and become part of the home of Mr. and Mrs. Graham. Neither must we write details of corresponding and quite undisputed facts disclosing that little Doyle mercifully knows and remembers only the home and care Mr. and Mrs. Krugh have bestowed on him since he was 20 months old. Probably, in all history of this Court, no better record of proper, loving and continuous care of little ones, by foster parents desiring their adoption, has been laid before us. Without assuming to decide the ultimate and properly triable issue — whether the natural parents are entitled to restoration of custody by a supplemental or new order — , our present course on these facts is accurately charted. The children should stay where they are until the mentioned issue is tried to verdict and judgment.

There is a special and separate reason for the determination I espouse. These children are now — and have been for six years — subject to the jurisdiction of the Berrien county probate court, juvenile division. Should they be sent away by these writs to a distant state, effective jurisdiction will have been lost to Michigan and cast upon Kansas. And in Kansas there may be no Krughs or Grahams available to take over when and if the next — from past experience — abandonment of Sally and Doyle takes place.

Recognizing, as I do, judicial authority to send infants beyond our borders and beyond judicial recall (Lewis v. Lewis, 338 Mich. 197, 200, 61 N.W. 2d 66), we should in this case announce the important qualification other courts in their wisdom have seen fit to plainly record. As was said in the annotated case of Pugh v. Pugh, 133 W. Va. 501, 509, 56 S.E. 2d 901, 905; 15 A. L. R. 2d 424, 430:

> "When the award of custody of an infant to a resident of another state, or the removal of the infant to another jurisdiction, will not serve, or is detrimental to, the welfare of the child, such award or such removal will not be permitted (citing numerous authorities). The power of the circuit court to award the custody of the child to the petitioner, who is not a resident of this State, and to permit her to remove the child from its jurisdiction and to the State of

> California, is clear beyond question. It should not exercise that power, however, unless the award of custody to a person who is not a resident of this State and the permission to take the child out of this State promote the welfare of the child."

The subject will be found thoroughly briefed in the above cited annotation, starting on page 432 of 15 A. L. R. 2d, under the heading "Nonresidence as affecting one's right to custody of child." The entire annotation may be summarized as a foresightedly accurate declaration of power and duty to release a child from the jurisdiction — to that of another state — when and only when it is found that the welfare of the child will best be promoted by an order for such release. Here there is no such finding, below or in our majority opinion, and none could be fashioned from this complete record without resort to transparent distortion.* In these circumstances (and entirely apart from other considerations presented in this opinion) I would resolve the doubt — there is none in my mind — in favor of present retention, of Berrien county's statutory probate jurisdiction, by and through dismissal of these writs. As was said in Butler v. Perry, 210 Md. 332, 342, 123 A. 2d 453, 458:

> "We do not suggest for an instant that if the best interests of a child required it that the child should not be sent out of the State. * * * We merely say that in a close case, such as the case before us, one consideration is that the Court may exercise much more effective control when custody is kept in the State."

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*Under date of October 19, 1955 (the petition for order of restoration having been recently filed), the Berrien county juvenile officer filed his detailed report with recommendation. It concludes, and I believe it to be the right fact-conclusion we should reach, as follows:

"It would be a perversion of justice to tear these children away from their present homes and place them back in a home where there is continual strife and insecurity."

Exhibit C

The supreme court of Minnesota had recent occasion to consider the application of a mother, made under circumstances much like those shown here, for custody of her young son and for leave to take him from Minnesota to her place of residence in Ohio (State ex rel. Jaroszewski v. Prestidge, 249 Minn. 80, 81 N.W. 2d 705, 710). The court's reasoning to denial of that application is, in my view, decisively good for the case at bar. The court said:

> "It is always difficult for a court to decide that a natural mother shall be deprived of the custody of her child. However, under the facts and circumstances here, we feel that it will not be for the best interests of the child at his tender age to take him away from the home and environment, church and school connection, which he has known up to now, and place him in the custody of respondent.
>
> "The record shows that he has been raised and cared for by appellants since he was a few months old; that they still desire to have him live with them; and that the boy seems happy and contented with his present home and environment. We believe that a serious emotional upset could result if a transfer of custody were made at this time. One of the considerations in our decision is the fact that there has been no satisfactory showing of a stable home or proper environment if custody were given to the respondent, nor has there been any convincing showing that her type of work and life have changed sufficiently so that the child should now be placed in her custody."

Summary

This case — one of review and approval of issuance of "technical writs" divesting the juvenile division of jurisdiction over two children whose right to exercise of such jurisdiction stands unquestioned by word or reason — goes into our reports crying in vain for answer, by our quadriad majority, of two stark questions: Was the juvenile division possessed of no jurisdiction, under said chapter 12A, to hear and determine the yet pending and ready-to-

be-tried statutory petition by the natural parents for restoration of custody? When and by what act or reasoning has the juvenile division lost its acquired jurisdiction over Sally and Doyle Fritts; the jurisdiction which concededly was vested in and with such division when the gavel announced the opening of court on August 4, 1952?

From such want of answer sprouts our incredible mistake in this case; that of release of these writs when no one here knows — any more than do the probate and circuit judges below — what today's fact-picture in Kansas (distinguished from that of more than two years ago) is or may be. Writs of habeas corpus either issue, or they do not. Let us hope that these errantly signed writs are arrested — short of the state line — before it is too late.

I vote to reverse with remand for dismissal of the writs and with instruction to proceed toward prompt trial of the pending appeal from probate court. Further, I would recommend to the circuit court that consideration be given to its discretion to order that such appeal be transferred to the jury calendar (See § 3 of Court Rule 33 and author's comment under § 2 of Court Rule 74)[10] and to provide by order for the appointment of a guardian and vigorous trial counsel for the real parties in interest, Sally and Doyle Fritts.

SMITH and VOELKER, JJ., concurred with BLACK, J.

SMITH, Justice (dissenting).

We would do well to take a hard second look at what is proposed here.

It is proposed that we hold to be "void" the order made by the probate court respecting these unfortunate children who, in their short lives, have known so much of what some of us would describe as neglect. It is proposed, let us stress, not that we find the determination of the probate judge to be merely erroneous, but to be utterly void. We are to hold

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[10]Honigman, Michigan Court Rules Annotated, p. 704.

that it is a complete nullity. A "void" judgment, as we all know, grounds no rights, forms no defense to actions taken thereunder, and is vulnerable to any manner of collateral attack (thus here, by habeas corpus). No statute of limitations or repose runs on its holdings, the matters thought to be settled thereby are not *res judicata*, and years later, when the memories may have grown dim and rights long been regarded as vested, any disgruntled litigant may reopen the old wound and once more probe its depths. And it is then as though trial and adjudication had never been. It is no answer to say that such things cannot happen in a modern society, particularly where the security of children's lives is involved. This case speaks for itself. Sally Fritts, one of the children before us, was 2½ years of age when her mother petitioned to put her children "in an adoptive home where they will be well cared for." The situation at that time may be gleaned in part from the report of the investigation for adoption made by the assistant county agent. It states, in part, as follows:

> "'The father was a drinker and left his family more than once. The mother tried several times to give her children away. At last she just left them crying in the office of the Juvenile Division of the Probate Court. She said that she would not keep them if she had money."

At this writing Sally is almost 9 years of age. Most of her life has been spent in the home she now knows and but few years of childhood remain. The plight of the mother at the time of giving up her children was tragic beyond words. But is it within our power to salve those wounds after these many years? Are we now to recreate her tragedy in the lives of the children? And what of the situation of those who have cared for these children through the long years of infancy?

This, then, is our problem. Mr. Justice EDWARDS holds that the order of the probate court taking permanent jurisdiction of these children was entered without "jurisdiction" and therefore "void." It would be well to keep constantly before us that this is the one situation

above possibly all others in the law in which the orders of a court should be vested with every security and finality at our command, namely, that involving the care and custody of children. Yet it is to this very situation that it is proposed to apply the most devastating weapon in the entire legal armory, the doctrine of lack of jurisdiction, of complete invalidity, of nullity. We cannot agree. Not only are we satisfied as to the evidentiary showing made in this particular case, but we are keenly aware of the force of precedent and have no wish to jeopardize the security of past and present custodial orders by the holding that a subsequent disagreement, on our part, with the probate court, on the sufficiency of the proofs of neglect (or like question) means that the probate court had no jurisdiction, and that its order was void, and is subject to collateral attack at any time. This is not to say that errors made by the courts of original jurisdiction may not be corrected. There is an orderly process of appeal provided for these matters and it should be timely utilized. We are not confronted, then, with the situation in which the only practicable avenue of redress was the great historic writ of habeas corpus. What is sought here is simply the substitution of the writ of habeas corpus for the right of appeal under the statute, or, at the election of these parents, for the right enjoyed by them to apply at any time in probate court for a new or supplemental order of disposition. It is proposed, simply, that we approve the habeas corpus because, it is said, the evidence upon which the probate court acted was so weak that it had no jurisdiction to enter the order and hence it was "void." The cost of what is here proposed, in terms of human interests involved, is staggering. How many other custodial orders may likewise be called "void" after many years have passed without appeal we have no way of knowing. Much would depend upon the strictness with which we might view the showing made. We are now, however, disposed to undertake that experiment.

Just what is this error so all-pervading that its commission makes a nullity of the court's process? The circuit judge pointed to irregularities in the procedures employed by the probate judge. These, however, were not jurisdictional. On this phase of the case I agree with the careful

analysis of Mr. Justice EDWARDS. The probate court did, in spite of such, obtain jurisdiction over the persons and over the subject matter. Where, then, lies the error so pernicious as to make the probate order a nullity? According to Mr. Justice EDWARDS there is a "glaring defect" in the evidence "presented at the hearing upon which the probate judge based his order." And what is this glaring defect? There was, we are told, insufficient evidence of neglect.

So, just at this point, we reach the crux of the case: There is a difference of opinion between some of our court and the probate court on the sufficiency of the evidence of neglect. We will assume, *arguendo*, that there was such a deficiency, that our brethren so believing are right, although we are keenly aware that we are the supreme court not because we are always right but that we are always right because we are the supreme court. At any rate, the probate court, we will assume, was in error. Mr. Justice EDWARDS holds that this makes its order "void," that the court lost jurisdiction, that its order was a nullity; in short, that all that was done amounted to no more than a pompous, cruel travesty of make-believe. Not merely are we to hold the order erroneous, we emphasize, subject to correction as all other errors in the law are corrected, but void. And this with respect to a matter (i. e., was there "neglect"?) with respect to which wide differences of opinion may honestly exist among reasonable and sincere men, and with respect to a branch of the law (the welfare of children) in which the most pressing need for security of adjudication exists.

The case before us well illustrates the pitfalls lurking in every step of the path proposed. At the time of the hearing on August 4, the probate court had before it a sworn petition by the mother that the father did not want his children, that "he drinks continually and beats me up, which frightens the children," that the father had left them and that she had found it necessary to go to the public authorities for aid. He had also the report of the assistant county agent that "this is not the first break-up which the Fritts family has undergone. It appears that there has been trouble during most of their married

life. The pattern of constant discord is there. On the information which has been gathered, it would appear that if the parents do live together, the discord would be a most pernicious influence on their children. If the parents do not live together, the children would have no security."

But not only did the probate judge have before him at this hearing these instruments, with their authors, but he had the parents themselves, and while we do not know precisely what transpired, since no stenographic notes were taken, we do have transcribed a hearing dated September 16, at which the hearing of August 4 was explored in detail. At no time upon this date (September 16) did Mr. Fritts see fit to refute the charges made against him, a course of action which would seem to suggest itself to any normal person who had been slandered thereby. As to the marital discord, which my brother would confine to isolated instances, we find in the record of September 16 the following (the assistant county agent is on the stand):

> "Q. Do your records disclose that Mr. Fritts told you prior to the hearing he wanted his children back? A. Yes, he called me. I made an appointment with him; he came over and said he wanted to get the children back. They admitted their family life had been a history of discord but they planned to do better."

The fruition of their plans to do better may be judged in part by the fact that Mrs. Fritts, while in Kansas, and less than a year before the habeas corpus hearing, petitioned for divorce on the grounds of "gross neglect of duty and extreme mental cruelty," and obtained a court order restraining Mr. Fritts from molesting her. This was on January 13, 1955. On June 25, she was back in court, asserting that she, relying on his promises, "took him back and they again lived together as man and wife" but that, subsequent thereto, he was again guilty of "gross neglect of duty and extreme mental cruelty toward the plaintiff," and again she obtained a restraining order. We observe, also, that in the hearing on September 16, Mrs. Fritts confirmed the truth of the matters alleged in her petition, coupling this, however, with the assertion that she wanted the children returned to her. Finally, with

respect to this hearing, in view of the fact that the judgment of the probate judge is assailed as being so utterly lacking in foundation as to render his order void, we think, in all fairness to him that his statement made at the close of the hearing should be made a part of our opinion:

> "This mother has, with substantial cross-examination, brought out what happened and I want her to know this, that we followed her wishes all the way through in placing those children in identically the kind of home she wanted after trying to dissuade her from this action on three different occasions. The point I want her to know is that the children would suffer greatly if they were moved at this time. I don't want to give an opinion now."

If in all of these charges, repeated and undenied, before the probate judge on August 4th, and the reports then available to him, there is not sufficient evidence of "neglect" the word has a poverty of meaning heretofore unknown to us. In this respect, Mr. Justice EDWARDS holds that "at the time of the hearing the probate judge had before him no evidence of neglect, either of long duration in the past, or from which any reasonable prediction of future neglect of permanent duration could be made." The emphasis here is apparently upon time, upon the elements of "long" duration and "permanent" duration. The difficulty with the distinction sought to be drawn, emphasized as it is with respect to temporary and permanent orders, is that we cannot define how long long is. How many times must the mother be required to appeal to the public authorities? How many times must the children go hungry? How often must the children witness the mother's beatings? The criterion, in our opinion, depends not upon the clock or calendar but upon all of the surrounding circumstances, the nature of the act or acts, the conditions under which committed, the provocations or lack thereof, and all of the many-colored hues going to make up the spectrum of life.

This determination I would leave in the trier or triers of the facts to whom jurisdiction is confided by statute. But when all is said and done (and here lies the point of

my difference with Mr. Justice EDWARDS), the decision of the probate judge upon the issue of neglect remains a matter to be corrected if in error, but not of *jurisdiction*. If he is wrong, if he makes a mistake, indeed; if he blunders, it is only that and nothing more. If he has jurisdiction of the parties and of the subject matter he does not lose it by making a mistake, for he has jurisdiction to make mistakes. Buczkowski v. Buczkowski, 351 Mich. 216, 88 N. W. 2d 416.

We need not, we assume, protest our jealousy of the rights of natural parents to their children. But these rights are not indestructible by the parents themselves. The parents may, by their own acts of cruelty or degradation, forfeit rights that we, under other circumstances, would protect and implement by every resource at our command. The beatings administered the mother by the father of the children may be suffered by the mother with whatever philosophy and fortitude she can muster. But we are not prepared to say that exposure to the spectacle, in addition to the balance of the matters shown, cannot constitute neglect of the moral welfare of the children. The persistence of reprehensible home conditions to a period only shortly antedating the hearing in habeas corpus is more than suggested by exhibits A, B, C and D, the instruments from the District Court for the County of Sedgwick, Kansas, in which Mr. and Mrs. Fritts were then residing, petitioning for divorce and for an order restraining her husband from molesting her.

The question here under examination, whether an erroneous (even conceding it to be such) finding of neglect results in a "void" order, on the theory that the court thus lost "jurisdiction" because of its error, had recent examination by one of the distinguished courts of the nation, the Court of Appeals for the District of Columbia, then comprising Justices Edgerton, Stephens, and Rutledge. This court, in the case of In re Stuart, 72 App. D. C. 389, 114 F. 2d 825, 826, had under consideration an appeal from a judgment (of the Juvenile Court of the District of Columbia) that a child "• • • was without adequate parental care and support and that she should be placed under the guardianship of a certain person • • •." The court, after

reviewing the proceedings and the evidence, concluded that the findings of inadequate parental care and the order transferring the child's custody were without warrant in the evidence. With respect to the issue before us, that of jurisdiction, the court held as follows:

> "By way of further clarification of the meaning of the Act we comment upon an argument of the appellant: It is said in the appellant's brief: 'Jurisdiction of the Juvenile Court under the Act * * * is dependent upon the evidence and in this case the evidence shows no such lack of parental care and support as would give the Juvenile Court jurisdiction to make appellant a ward of the Court.' And throughout the oral argument of the appellant it was insisted that the Juvenile Court was without 'jurisdiction' to make the order appealed from.
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> "While it is sometimes loosely said that a court has no 'jurisdiction' to make an order not supported by the evidence necessary to prove the cause of action set forth in the complaint which invokes the action of the court, it is important to point out, for the sake of clarity in respect of the power of the Juvenile Court, that in the proper sense of the word jurisdiction a court has jurisdiction, in the sense that its erroneous action is voidable only and not void, when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the complaint is not obviously frivolous. Binderup v. Pathe Exchange, 1923, 263 U. S. 291, 305, 306, 44 S. Ct. 96, 68 L. Ed. 308; and see Howat v. Kansas, 1922, 258 U. S. 181, 189, 42 S. Ct. 277, 66 L. Ed. 550; Cooper v. Reynolds, 1870, 10 Wall. 308, 316, 19 L. Ed. 931; Brougham v. Oceanic Steam Navigation Co., 2 Cir., 1913, 205 F. 857, 859; Hughes v. Cuming, 1900, 165 N. Y. 91, 95, 58 N. E. 794. In this proper sense of the word jurisdiction the Juvenile Court in the instant case had jurisdiction to make the order appealed from. The parties were before it, the case described in the petition was within the class of cases which the Act gives the court power to deal with — to-wit, a case involving

a question of adequate parental care of a person under the age of eighteen — and the petition on its face stated a cause of action. That the evidence failed to support the petition did not affect the jurisdiction of the court, in the proper sense of the term, to hear the cause and to make the order. But it did, as we have pointed out above, make the action of the court erroneous and subject to reversal on appeal." 114 F. 2d at pages 833-834.

The decision is eminently sound. The loose use of the word "jurisdiction" as synonymous with "error" can only serve to introduce untold confusion in the law. Buczkowski v. Buczkowski, supra. Thus, as we write, we find in the record of an automobile-accident case now before us the assertion made to the trial court (upon objections made to jury charges) that such court "was without jurisdiction in the matter, after having denied defendant's motion for a directed verdict * * * to charge the jury that, as a matter of law, Mr. ——— was guilty of negligence."

If by this is meant that the trial court, having jurisdiction of the parties and the subject matter, lost such jurisdiction because of the allegedly erroneous charge, it is complete and utter nonsense. A court, having jurisdiction, does not lose it by erroneously charging, by erroneously directing a verdict, or as here by (allegedly) erroneously entering an order respecting custody.

We have not, in the above, weighed the merits of the respective parents. We have not matched, as in the prize ring, the claims of the distraught natural mother, whose feelings as she abandoned her children are probably beyond our full understanding, against those of the foster mothers, as they embrace, awaiting our decision, those children who, as has been said, drew in their hearts rather than under them. We have not done these things because, although their tragedies are not remote from us, our primary concern is the welfare of the children.

Let there be no misunderstanding in anyone's mind about the lack of justification for what the majority is here doing. We are not acting under the whip of an inexorable statute which we have neither the will nor the wit to in-

terpret, for there is no statute commanding this result. The common law does not demand it. Apt precedent denies it. Why, then? Simply and solely because of our majority's stumbling over one of the most basic concepts known to the law, that of "jurisdiction" to hear and decide. This concept, if misapplied, is so perilous to the stability of the judicial process, to the principles of *res judicata*, that we recently in an unanimous opinion warned the profession against its loose use. We cautioned not to confuse a court's reaching the "correct" result with its jurisdiction to hear and decide. We pointed out that a court having jurisdiction of the parties and the subject matter has also the jurisdiction to err. Having said all of this in Buczkowski, supra, a few scant weeks ago, we now plunge into the very pit over which we posted the warning and we drag the Fritts children in with us.

We will climb out, of course. The sun will not set on this day before we will be forced to devise ways first to distinguish, then to repudiate, then to bury, this case as authority. No court can live with the proposition that jurisdiction to hear and decide depends upon evidence sufficient to justify the remedy prayed, for we do not reach the question of remedy in the matter before us until we have crossed the bridge of jurisdiction. But what, in the meantime, of these children? Are they never to know surcease from sorrow? Were their cups not filled to overflowing six years ago? Are we now to add the hemlock?

The circuit judge was in error in deciding that the probate court did not have jurisdiction of the matter before it. The writs issued in circuit should therefore be dismissed, without costs.

BLACK and VOELKER, JJ., concurred with SMITH, J.

Respectfully submitted,

A. H. Lee,
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